(2054) TRANSCRIPT OF RECORD

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1927

No. 510. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. FIREMAN'S FUND INSURANCE COMPANY

No. 511. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. GLOBE & RUTGERS FIRE INSURANCE COMPANY

No. 512. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. NORTHWESTERN FIRE & MARINE INSURANCE COMPANY

No. 513. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. HARTFORD FIRE INSURANCE COMPANY

No. 514. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. NATIONAL LIBERTY INSURANCE COMPANY

No. 515. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. ÆTNA INSURANCE COMPANY

No. 516. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. WESTERN ASSURANCE COMPANY

No. 517. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

No. 518. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. NORTHUMBERLAND FIRE & MARINE INSURANCE COMPANY

No. 519. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. FRANKLIN FIRE INSURANCE COMPANY

No. 520. THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner, vs. PHŒNIX INSURANCE COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED , 1927

[illegible]

UNITED STATES

CIRCUIT COURT OF APPEALS

[illegible]

No. 4828

[illegible]

vs.

[illegible]

Appeal from the District Court of the United States for the [illegible]

[illegible]

[illegible]

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Versus

FIREMAN'S FUND INSURANCE COMPANY.

No. 17,205

Appearances:

Messrs. Dart & Dart, Andrews, Streetman, Logue, & Mobley, and Messrs. Bigham, Englar, & Jones, Proctors for Fireman's Fund Insurance Company, Appellant.

Messrs. John D., M. A. & Edwin H. Grace, Proctors for The Compania de Navegacion, Interior, S. A., Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within 30 days from the 19th day of July, 1926, at the City of New Orleans, La.

EXTENSION granted by the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, bringing the return day up to and including the 19th day of October, 1926.

TRANSCRIPT OF RECORD.

2 LIBEL.

Filed Nov. 21, 1922.

To the Honorable Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division. No. 100:

The Compania de Navegacion, Interior, S. A., a corporation organized and existing under the laws of the Republic of Mexico, with its principal place of business at Tampico, in said Republic, herein duly represented by its president, Clyde Barbour, exhibits this its libel against the Fireman's Fund Insurance Company, a corporation organized and existing under the laws of the state of California, with its principal place of business in San Francisco, in said state; which said Insurance Company is duly represented in this district by the Secretary of the State of Louisiana; said Insurance Company having appointed him as a proper person upon whom to make service to bring said Company before the Court in cases of this kind; and, thereupon, in a cause of contract, civil and maritime, libelant articulately propounds as follows, to-wit:

First: That at the time the insurance evidenced by the policy hereto attached as part hereof was underwritten by respondent herein on the Mexican steam tug "Wash Gray," her body, tackle, apparel, furniture, stores, supplies, engines, machinery and appurtenances, as well as long prior thereto and down to the time of her absolute loss by sinking in the Gulf of Mexico, as hereinafter stated, she was with all her said body, tackle, apparel, etc., owned by libelant.

Second: That while the said tug was lying at Tampico, Mexico, her said owner, libelant, sought to secure insurance on the said vessel, and to this end made due application therefor to the following Underwriters, to-wit:

Fireman's Fund Ins. Co., of San Francisco, Calif.
Western Assurance Co., of Toronto, Canada.
Liverpool & London & Globe Ins. Co., Ltd., of Liverpool, Eng.
National Liberty Insurance Company of America.
Hartford Fire Insurance Co., of Hartford,
3 Conn.
Northwestern Fire & Marine Ins. Co., of Minneapolis, Minn.
Aetna Insurance Co., of Hartford, Conn.
Globe & Rutgers Fire Ins. Co., of New York, N. Y.
The Phoenix Insurance Co., of Hartford, Conn.
Springfield Fire & Marine Ins. Co., of Springfield, Mass.
The Franklin Fire Ins. Co., of Philadelphia, Pa.

to execute insurance on the said steam tug "Wash Gray," each for a portion of an aggregate sum of Eighty-Five Thousand Dollars ($85,000.00), covering a voyage of said tug while in tow, from Tampico, Mexico, to Galveston, Texas, U. S. A., whereupon the said defendants agreed to write said insurance. But some of the above named underwriters advised libelant that Mr. James F. Taylor would be required by them to pass upon the seaworthiness and towing arrangements for said vessel for the said voyage; and the others of said underwriters advised libelant that a Lloyds or other approved Marine Surveyor would be required by them to pass upon the seaworthiness and towing arrangements for said vessel for the said voyage.

Third: That at the time above referred to, the said James F. Taylor was then, as well as long prior thereto and down to the present time is the Agent of the United States Salvage Association, an American corporation, with its principal place of business at New York City, wherein the defendant herein was then, prior thereto, and down to the present time a shareholder and actively interested in the maintenance of said corporation and in its operations. The headquarters of said James F. Taylor, as such agent, was, during said time located at Tampico, Mexico.

Fourth: That Mr. Verne Dyer, hereinafter referred to, was, at the time herein mentioned, as well as for a long time prior thereto and down to the present time, a surveyor to Underwriters Agent, including Lloyds; and the survey report made by him on said tug "Wash Gray," was indorsed as follows:

4

"To be appended to the Report of a Surveyor employed by Underwriters' Agent.

"I, William J. Pulford, Underwriters' Agent, certify that Verne Dyer, Marine Surveyor, has been employed by Jesse Barbour, owners agent of the Mexican tug "Wash Gray," and myself to survey that vessel, and I believe confidence may be placed in this certificate."

(Signed) WM. J. PULFORD.

Stamped:
"The Board of Underwriters of New York,
W. J. Pulford, Correspondent,
Tampico, Mexico."

That defendant herein is a member of the above referred to Board of Underwriters of New York.

Fifth: That to meet the special requirements of each one of the said Underwriters, the said Messrs. James F. Taylor and Verne Dyer both entered upon their several duties in the premises, and in due time each one of the said Marine Surveyors to Underwriters' Agents reported respectively, as follows:

Seaworthiness:
May 10th, 1922.

Report of survey made by the undersigned surveyor, of the United States Salvage Association, Inc., on May 3rd, 1922 and subsequent dates, at the request of J. C. Barbour of the Cia de Navegacion Interior, S. A., owners of the vessel Wash Gray, 105.25 gross tons 1935 official number, Ramon Buda, Master, while she lay afloat along side of the dock of said Company, in order to examine and report upon condition of her seaworthiness, in regards to being towed from the port of Tampico, Mex. to the port of Galveston, Texas, for dry docking and repairs. For details of recommendations, see report as follows:

Upon examination found:	Recommended:
1. Both forward bitts open at deck.	To be caulked and made water tight.
2. All seams on forward main deck open back to wheel house.	To be caulked and made water tight.
3. All seams on after main deck open, to after end of wheel house.	To be caulked and made water tight.

4.	Cargo and coaling ports open.	To be planked over and made tight.
5.	All windows and doors in lower wheel house open.	To be planked over and made tight, and doors fastened secure.

All dirt in bilges to be removed, and vessel made clean, so syphons and pump can have free suction. Steam to be raised on the boiler and head of steam kept till vessel reaches the port of Galveston.

Pumps and syphons to be worked in the presence of Surveyor before vessel leaves this port.

The undersigned visited the vessel after all recommendations were carried out, and found vessel, on this 10th day of May, 1922, in a seaworthy condition, and fit to be towed to the port of Galveston, Texas.

(Sgd.) JAMES F. TAYLOR,
Surveyor.

I, Verne Dyer, Marine Surveyor, certify that at the request of Jesse Barbour, Owners' Agent of the Mex. Tug Wash Gray, and William J. Pulford, Underwriters' Agent at Tampico, Mexico, I surveyed that vessel on the 10th day of May, 1922—4:30 P. M. Last, in consequence of her having been prepared to be towed to Galveston or other Texas Port.

6

On examination of this vessel on the day named I found all deck openings have been tightly closed and properly battened; all window openings in the house structure have been boarded up; a 600 lb. anchor with 60 fath. of 6½" hawser has been provided; three 2" syphons and two 6"x4"x6" steam pumps are installed for caring for any emergency; steam will be carried throughout the voyage. A Master, Engineer and two

Firemen will be aboard during the voyage. Proper life boat, life preservers and full complement of lights are carried. .....

In my opinion this vessel is in first class condition to be towed to any Texas Port during the next sixty days .....

From the survey I have been able to make, as far as possible, I conscientiously believe the said vessel can proceed on her voyage, towed to any Texas Port.

Given & c.

(Sgd.) VERNE DYER,
Surveyor to Underwriter's
Agent.

Received for this Survey and Report two visits and all expenses $50.00 Mexican Gold.

(To be appended to the Report of a Surveyor employed by Underwriter's Agent.)

I, William J. Pulford, Underwriters' Agent certify that Verne Dyer, Marine Surveyor, has been employed by Jesse Barbour, Owner's Agent of the Mex. Tug Wash Gray and myself to survey that vessel, and I believe confidence may be placed in this certificate.

(Sgd.) WM. J. PULFORD.

Received Agent's Fee for this Certificate—$20.00 Mex. Gold.

Stamped:

"The Board of Underwriters of New York,
W. J. Pulford, Correspondent,
Tampico, Mexico."

7 The towing arrangements referred to were passed on in separate reports, wherein each one of the said two surveyors reported in identical language as follows:

"Wash Gray ready for sailing. Vessel seaworthy and approved. Also towing arrangements approved. Carries steam and crew. Date of sailing furnished later."

On account of the difficulty experienced in obtaining a towing vessel, the date of sailing was necessarily delayed. So a request to extend the time for sailing was made on the Underwriters, and a copy submitted to them of the following wire sent assured's brokers by said broker's corespondent, to-wit:

"Wash Gray couldn't get Tamiahua. Have now practically arranged to be towed steamer Freeport Sulphur Number One Tampico to Freeport whilst there and thence in tow of tug to be approved Captain Grant to Galveston. Assured's Tampico office getting Taylor and Verne Dyer approve towing by Freeport Sulphur which is expected sail June third."

To the above, the various underwriters gave their assent, and, further, as June first was originally set as limit of sailing date of the tug "Wash Gray" from Tampico, the said Underwriters verbally agreed to and did extend her sailing date. So, when the policies were executed by each one of the above named Underwriters, they wrote therein a stipulation covering the said tug "Wash Gray" on trip from Tampico to Freeport, Texas, in tow of steamer Freeport Sulphur No. 1, and whilst there and thence in tow of an approved tug to Galveston, warranted sailing from Tampico on or before June 15,

1922; and warranted sailing from Freeport on
8 or before June 30, 1922; all as will more fully appear by reference to the policy of insurance written by defendant herein; which said policy is hereby made a part hereof as if at large set out herein, and for purpose of identification herewith is marked Libelant's "Exhibit A."

Thereafter, the said James F. Taylor and Verne Dyer, Surveyors to Underwriters Agents, approved the "Wash Gray" to be towed by the Steamship Freeport Sulphur No. 1. The voyage covered was actually commenced in tow of the Steamship Freeport Sulphur No. 1, on June 6, 1922, well within the warranty set out in each of the policies of insurance as follows:

"Warranted sailing from Tampico on or before June 15, 1922."

Sixth: That at the time the aforesaid insurance was effected, the ordinary prevailing rate for vessels ordinarily built and equipped for such a voyage was approximately one-fourth of one per cent, but the said Underwriters taking into consideration that because of her character and qualities the tug "Wash Gray" was an extra hazardous risk for this voyage charged proportionately for this enhanced risk, a premium running from one and one-half to two and one-eighth per cent, as respectively determined by the said Underwriters, which said premiums the assured paid. That the amount of insurance underwritten by the aforesaid Underwriters on said tug for said voyage including defendant herein, is as follows, to-wit:

Fireman's Fund Insurance Company of San Francisco, California	$10,000.00
Globe & Rutgers Fire Ins. Co. of New York	23,000.00

The Franklin Fire Ins. Co. of Philadelphia, Pa.	11,000.00
The Phoenix Insurance Co. of Hartford, Conn.	15,000.00
Springfield Fire & Marine Ins. Co. of Springfield, Mass.	5,000.00
Aetna Insurance Company of Hartford, Conn.	4,000.00
The Western Assurance Company of Toronto, Canada	4,533.00
The Liverpool, London & Globe Ins. Co. Ltd., of Liverpool, England	3,867.00
The Hartford Fire Insurance Co., of Hartford, Conn.	4.200.00
Northwestern Fire & Marine Insurance Co., of Minneapolis, Minn.	2,800.00
National Liberty Insurance Co. of America	1,600.00
Making an aggregate insurance of	$85,000.00

And no other insurance was effected on the said steam tug.

Seventh: That on the sixth day of June, 1922, the said tug "Wash Gray" having on board its complement of officers and crew as required, and being otherwise ready in every respect for the said voyage about to be undertaken, the said steamship "Freeport Sulphur No. 1" came up to her and passed over to this tug two manilla cables for towing, which were securely attached to the said tug, and the said voyage was entered upon. The said steamship with its tow left the jetties at about 4:45 P. M. of the said sixth day of June, with everything going well. That from the time of leaving the jetties the weather was good until about 8:00 P. M. on the seventh, when a fresh breeze commenced to blow.

which caused the "Wash Gray" to pitch and pound and receive heavy seas on board. That when this condition arose the master of said tug at once caused the mate to make a careful inspection of the bitts, to which the tow lines were secured, which were being subjected to a very heavy strain, and of the hull of the vessel, on account of the pitching and pounding and rolling of the vessel and the heavy seas which were boarding her, causing severe strain to bitts and hull; when it was ascertained that under the heavy strain on the bitts to which the tow lines were made fast, and on account of the pitching with consequent pounding and rolling of the tug, with heavy seas washing over her head, that the bitts were working loose, creating an opening at their base through which water entered her hull; and leaks developed in her hull, endangering the safety of this vessel. The pumps of the "Wash Gray" were at once started and worked effectively throwing water out of the hull of the tug; and a Spanish windlass was made to pull the bitts back in place, and other efforts made to prevent, or at least, lessen the quantity of water entering the hull; but notwithstanding the very large pump power, all effectively at work, and the best services of officers and crew of the tug, the water continued to increase in volume in the hold of said tug, thus making the vessel slow to raise to the seas which continually boarded her, until at 11:30 P. M. the "Wash Gray" gave a heavy plunge which caused water which was in her hold to pass to her head and made the vessel lose her balance. It appearing that her head would not now come up on account of the seas washing over it, in this situation, signals were made to the towing ship to stop and the towing cables were cut in order to save the tug. As soon as these lines were cut and the strain occasioned by pulling her

through the seas relieved, the tug's head came up. Within a short time thereafter, the said steamship came near by to ascertain the trouble, whereupon the master of the tug advised the master of the said steamship that the tug was making such a quantity of water, she would not stand further pulling. At this time all the tug's pumps were working to full capacity, but the water continued to gain in the tug's hull; and as the night was a bad one, with this ever increasing danger
11 to officers and crew of the tug while they remained on board, with the tug taking a constantly increased volume of water, the master of said tug at about two forty five A. M. requested the master of the steamship Freeport Sulphur No. 1 to take off all the officers and crew as they were fearful of losing their lives, which was done, but all pumps and syphons were left running to full capacity. The Steamship Freeport Sulphur No. 1 continued to stand by, and at daylight the weather and sea having abated to some extent, the master of the said steamship sent his first mate and Chief Engineer with six men on board the tug "Wash Gray," to see what, if anything they could do. As steam had gone down and water in boiler was almost exhausted by evaporation due to operating pumps and syphons during all of said time, the tugs boiler was pumped up from a hose led from said steamship, as this service could more readily be done than the much slower process of pumping up the boiler by means of the hand pump provided therefor, when steam was not available to operate the steam boiler feed pump; but the water was so deep in the tug's hold that it came up to the fire box, putting the boiler out of commission, even though the tugs hand pumps were kept vigorously going. The Chief Engineer of the ship after making some futile efforts to aid the tug, stated to the master of that ship there was no use

making any further efforts to save the tug, and that they had better leave her. After all men had returned to the ship, the Freeport Sulphur No. 1 then proceeded under very slow speed, with tug in tow, making about one mile per hour; this was at about 10 A. M. June 8th. At about 10:30 A. M. the tug was seen to be slowly going under and completely disappeared within a short time thereafter. Before the tug sank the steamship came to a complete standstill and as the tug went down the master of the steamship ordered the hawsers cut. At this time the weather was cloudy and squally with a choppy sea.

Eighth: That the insurance written by each of the above named companies is in favor of libelant, the Compania de Navegacion Interior, S. A., and or Clyde Barbour on account of whom it may concern, loss, if any, payable to assured or order as interest may appear. That the said Clyde Barbour is the president of the said Compania de Navegacion Interior, S. A., and he appears herein on behalf of said company, asking the entire amount of said insurance be paid to the said company.

Ninth: That due proofs of loss were furnished defendant herein June 20, 1922, and they, together with the other Underwriters within a short period of time thereafter refused payment of the loss, setting up that in their opinion the vessel was unseaworthy; although she was specially examined and passed for seaworthiness and towage arrangements by Marine Surveyors to Underwriters' Agents, as required by defendant, before the voyage was commenced. Subsequently, that is to say the last week of October, 1922, the defendant and other associated Underwriters set up the further contention,

for refusing payment of the loss, that they had no knowledge of the nature of the terms of the contract with the Freeport Sulphur Company for towage of the "Wash Gray"; although they wrote the insurance specifically for this lost tug to be in tow of that Company's Steamship "Freeport Sulphur No. 1," therefore, well knew there was a towage contract in existence, and never at any time asked a view thereof, which would readily have been granted, especially so as it evidences nothing more than the usual common terms for towage services between Mexican ports and American Gulf ports, as such contracts have been made through many
13 years, and a copy of which contract was furnished the defendant June 20, 1922, as one of the documents making up their proof of loss. Hence, libelant respectfully submits that under the circumstances libelant should be allowed interest on the said loss from July 20, 1922, which is thirty days after proof of loss was furnished defendant, at which time payment became due, until said loss is paid.

Tenth: That all and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

Wherefore, the premises considered, libelant prays that process issue herein, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against the said Fireman's Fund Insurance Company, citing and admonishing the said Company by and through its proper officers, agent or representative, authorized for such purpose, to be and appear before this Honorable Court, there to answer under oath by a certain day all and singular the matters aforesaid, and that after due proceedings had that there be judg-

ment in favor of libelant against the said Fireman's Fund Insurance Company in the sum of Ten Thousand Dollars ($10,000.00), together with legal interest thereon, from the 20th day of July, 1922, until paid, and all costs of Court; and libelant prays for all such other further and general relief and redress in the premises, as in law and justice it may be entitled to receive, and the Court competent to grant.

(Sgd.) JOHN D. and M. A. GRACE,
Proctors for Libelant.

COMPANIA DE NAVEGACION,
INTERIOR, S. A.,
(Orig. Sgd.) By CLYDE BARBOUR,
President.

State of Texas,
City of Houston.

Clyde Barbour, being first duly sworn doth depose and say that the Compania de Navegacion Interior, S. A. is a corporation organized and existing under the laws of the Republic of Mexico, and is not represented in these United States by any officer or other person excepting himself; and that he is the president of said Company. That to the best of deponent's knowledge, information and belief the facts set out in the foregoing libel are true and correct. Deponents knowledge was obtained from the protest of the officers and crew of said tug "Wash Gray," from Surveyors' reports and correspondence in libelant's files.

14

(Orig. Sgd.) CLYDE BARBOUR.

Sworn to and subscribed before me this 20th day of November, 1922.

(Orig. Sgd.) H. L. NICHOLSON,
(Seal) Notary Public, Harris County,

ORDER.

Let admiralty process issue as prayed for.

(Orig. Sgd.) H. J. CARTER,
Clerk, United States District Court.

Nov. 21, 1922.

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15 COPY OF INSURANCE POLICY.

Filed May 31, 1926.

(Vessel.) Copy of Policy No. 15567.

A Stock Company.

Fireman's Fund Insurance Company of San Francisco.

Atlantic Marine Department,
72 Beaver Street, New York,
Charles R. Page, Manager.

Do make insurance and cause Compania de Navegacion Interior S. A., and/or Clyde A. Barbour, on account of themselves, loss, if any, payable to assured or order, as interest may appear, to be insured for an amount not exceeding the sum of Ten Thousand Dollars, upon the good Steam Tug called "Wash Gray", her body, tackle, apparel and furniture, stores, supplies, engines, boilers, machinery and appurtenances, at and from at noon of the ..... day of ..... (warranted by the Insured to be then in safety), until noon of the ..... day of ..... unless sooner terminated or made void by conditions hereinafter expressed.

Warranted confined to the use and navigation of the covering trip from Tampico to Freeport, Texas, in tow of Steamer "Freeport Sulphur No. 1" and whilst there and thence in tow of an approved tug to Galveston and for 24 hours after arrival. Vessel and towing arrangements subject to approval of surveyor of United States Salvage Ass'n. (Jas. F. Taylor). Warranted sailing from Tampico on or before June 15th, 1922 and warranted sailing from Freeport on or before June 30th, 1922; with privilege to lay up and make additions, alterations and repairs, and to go in Dry Dock. Losses or averages of each voyage or trip to be adjusted separately.

Any deviation beyond the limits named in this Policy shall void this Policy, but upon the return of said vessel within the limits named herein, this Policy shall reattach and continue in full force and effect, but never beyond the date hereinbefore set for the termination of this Policy, and provided only, no disaster has occurred during said deviation.

The said vessel, tackle, apparel, stores, supplies, furniture, engines, boilers, machinery and appurtenances, hereby insured are valued at Eighty-five Thousand Dollars, and the Insured agrees to effect and keep insured the whole of said valuation, or be deemed co-insurer for the deficiency.

It is the intent of this Insurance Company by this policy, to fully idemnify the Insured for this Company's proportion of all General Average charges, salvage expenses and loss, damage, detriment or hurt to said vessel for which it may be liable under this Policy, against the adventures and perils of the harbors, bays, sounds, seas, rivers and other waters as above named, and fires that shall come to the hurt, detriment or damage of said vessel or any part thereof. Excepting always all claims arising from or caused by the following, or other

legally excluded causes, viz: From all damage that may be done by the vessel hereby insured to any other vessel or property. From incompetency of the Master or insufficiency of the crew, or from the want of ordinary care and skill in loading and stowing the cargo of said vessel. From rottenness, inherent defects, and other unseaworthiness. From war, invasion, riots or civil commotion, theft, barratry or robbery. From the bursting or explosion of boilers, collapsing of flues, or any injury, derangement or breakage of machinery, unless caused by stress of weather, stranding, collision, or burning. From charges, damage or loss in consequence of seizure or detention for or on account of any illicit or prohibited trade or trade in articles contraband of war, or from the violation of any port regulation. For any claims for wages or provisions furnished to officers or crew while the property insured may be detained by any disaster or during subsequent repairs, excepting always services rendered in the recovery and securing the vessel or property covered by this policy. And from anchors being cast without being properly or sufficiently buoyed. From gangways and openings through the deck or sides not being properly secured and protected. And it is understood that no loss is to be paid arising from any negligence in not keeping vessel well pumped out, excepting in case of accident.

Warranted by the Insured not to carry petroleum, gun powder or other explosives, lime, hay or straw, unless by special agreement in writing hereon. But in no case shall the Company be liable for a greater amount than the sum insured hereby, either for total loss, partial loss, General Average, salvage and other expenses, or all combined.

Warranted by the Insured that the said vessel shall at all times during the continuance of this Policy, be tight

and well found in anchors, cable, rigging, tackle and apparel, as is usual and customary; also, in all other things and means necessary and proper for safe navigation, according to the usage and custom; that she shall at all times have a competent watchman on board; and that whenever said vessel shall lie at anchor in the night time, she shall show one or more lights in a conspicuous place so as to warn and give notice to approaching vessels.

The Insurers to be paid in consideration of this insurance One Hundred Sixty-two and 50/100 Dollars, being the rate of One and five-eighths per cent.

And in case of any loss or misfortune it shall be lawful and necessary to and for the Insured, their agents, factors, servants and assigns to give the Insurers notice of the disaster and/or damage as soon as known to the Insured and arrange that survey as provided for herein, shall be held within ten (10) days thereafter and a failure to do so shall render the Insurers free from any liability for loss or damage under this Policy, to sue, labor and travel for, and to make all reasonable exertions in and about the defense, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery, two competent surveyors shall be appointed, one chosen by the Insurers and one by the Insured, or their agents (and in case of disagreement between them they shall appoint an umpire), whose duty it shall be to make specifications in writing, clearly stating both the amount of work and the manner in which it shall be done to make said vessel good for any damage caused by the disaster; but if shown on any survey provided for in this Policy that repairs cannot be made, to make the vessel good for damages caused by the disaster without making good defects caused by rottenness, then the said surveyors are to state the nature

and amount of work that shall be done to make good such defects, the Insured being liable for the whole expense of same; from surveyor's specifications estimates shall be obtained from responsible boat-builders or ship-wrights, giving the cost of repairs called for by survey, and the Insurers may contract with the party making the lowest estimate to make said repairs, to the expenditures and amount whereof, the said Insurance Company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus, if any, paid, or advanced by said Insurers, shall be a lien upon and shall be recoverable against the said vessel or any part thereof, or against the Insured at the option of the Insurers. It is further agreed, the aforesaid survey shall be considered binding both by the Insurers and the Insured; but in case the Insured or their agents refuse to appoint a surveyor to represent their interest the Insurers may appoint two competent surveyors to hold binding survey from which the Insurers may receive estimates, and repair the vessel for and on account of the Insured, the Insurers also reserving the right to call a survey, receive estimates and make repairs at any point where they shall deem it most advantageous for themselves. No claim for loss or damage shall go beyond the extent or cost of actual repairs rendered necessary in consequence of any disaster insured against. No partial loss, or particular average, shall in any case be paid by the Insurers unless it exceeds Eight Hundred Fifty Dollars. All losses incurred hereunder shall reduce the liability under this Policy to the extent of the amount of same, until the amount be made good by additional insurance with additional premium paid therefor.

Losses shall be payable in thirty days after proofs of such loss, or damage, and the cause of same, and of the amount thereof, and proof of the interest of the In-

sured shall have been made and presented at the office of said Company, (the amount of any indebtedness due this Company from the Insured and/or any other party interested in this Policy being first deducted.) And in all cases of loss, either General Average, Partial, or Total Loss Eight Hundred Fifty Dollars shall be deducted therefrom.

It is understood and agreed that no Average is to be deducted in case of total loss payment where the vessel does not remain in specie, or where there is such payment with the transfer of all salvage as provided for in the Policy.

It is agreed, that the acts of the Insured or Insurers, or their agents in recovering, saving and preserving the property insured in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this Policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the Insured shall not have a right to abandon the vessel under this Policy, but if the Insured decide not to repair or rebuild the vessel when the cost of repairing or rebuilding exceeds the valuation herein, the Insurers shall be entitled to all salvage thereon upon payment of a total loss. The valuation of said vessel expressed in this Policy, shall be considered the proper value in adjusting losses covered by this Policy, except that in cases of loss by jettison, or of any sacrifice for the general benefit, or of any general average act, the Insurers shall be liable for same when the contributory value exceeds the valuation herein, only in the proportion that the amount hereby insured bears to said contributory value.

Any agreement, contract or act, past or future, positive or implied, by the Insured whereby any right of

recovery of the Insured against any vessel, person or corporation is released, decreased, transferred or lost which would, on acceptance of abandonment or payment of loss by this Company, belong to this Company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the Company's right to retain or recover the full premium shall not be affected.

It is understood and agreed that no custom, usage or waiver of any kind shall affect, control or void any condition of this Policy, unless indorsed hereon in writing.

It is also agreed, that this policy shall become void if any other insurance is or shall be made, upon the vessel hereby insured, which together with this insurance shall exceed the sum of Eighty-five Thousand Dollars.

It is also agreed, that all claims under this policy shall be void unless prosecuted within twelve months from the date of the disaster.

The interest of the Insured in this Policy, or any part thereof, or in the property insured, or any part thereof, is not assignable, unless by consent of this Corporation, manifested in writing, and in case of transfer or termination of any such interest of the Insured, or any change of the nature of the insurable interest of the Insured in the property aforesaid, either by sale or otherwise, without such consent, this Policy shall from thenceforth be void and of no effect.

Either party may cancel this Policy by giving fifteen days' notice in writing, if at the option of this Company pro rata rates, if at the request of the Insured short rates will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

In witness whereof, the said Company has caused these presents to be signed by its duly authorized officers in the City of San Francisco, and by its Manager of the Atlantic Marine Department in the City of New York, but this policy shall not be valid unless countersigned by the Company's duly authorized representative.

(Signed) A. W. FALLONSBEE, JR.,
Marine Secretary.
(Signed) J. B. LEVISON,
President.
(Signed) CHAS. R. PAGE,
Manager.

Countersigned at New York, the 8th day of June, 1922.
(Signed) By H. N. BUSWELL.

Amount Insured—$10,000.

Vessel valued at—$85,000.

Rate—1-5/8%.

Prem.—$162.50 Net Cash.

Average—$850.

Limit of Insurance—$85,000.

It is a condition of this policy that any broker, person, firm or corporation who shall procure this insurance to be taken by this Company, shall be deemed to be exclusively the agent of the insured in any and all transactions and representations relating to this insurance.

Warranted free of capture, seizure, arrest, restraint, preemption or detainment and the consequences thereof or any attempt thereat, and whether as an act of war or by civil authority or by any person or persons whatsoever, lawless or otherwise; and also free from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Warranted free of loss or damage caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

Any agreement, contract or act, past or future, positive or implied, by the insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost which would, on acceptance of abandonment or payment of loss by this Company, belong to this Company, but for such agreement, contract or act shall render this policy null and void as to the amount of any such loss or damage, but the Company's right to retain or recover the full premium shall not be effected.

Warranted by the Insured that there shall be no insurance for or on account of the Insured upon any other interest than Hull, Freight, Cargo or Stranding and Collision Liability.

It is agreed that there shall be no return of premium if interest insured be lost by perils not insured against hereunder.

16 ANSWER.

Filed February 3, 1923.

To the Honorable the Judges of the United States District Court, for the Eastern District of Louisiana:

The Answer of Fireman's Fund Insurance Company to the libel and complaint of Compania de Navegacion Interior, S. A., in a cause of contract, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First: Respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "First" of the libel herein.

Second: Respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "Second" of the libel herein, except that it admits that the libelant and one Clyde A. Barbour applied to the respondent for insurance on the steam tug "Wash Gray" in the sum of Ten Thousand ($10,000.00) Dollars, covering said vessel at and from Tampico to Freeport, Texas, in tow of the steamer "Freeport Sulphur No. 1," and whilst there and thence in tow of an approved tug to Galveston and for twenty-four hours after arrival.

17 Third: Respondent admits the allegations contained in paragraph numbered "Third" of the libel herein, but respondent alleges that in respect of any and all services performed by the said James F. Taylor in connection with the approval of the steamtug "Wash Gray" and the towing arrangements of said ves-

sel, that the said James F. Taylor acted as agent and surveyor for both the libelant and the respondent herein.

Fourth: Respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "Fourth" of the libel herein, except that it admits that it is a member of the Board of Underwriters of New York.

Fifth: Answering the allegations contained in paragraph numbered "Fifth" of the libel herein, respondent denies that it has any knowledge or information sufficient to form a belief as to the requirements of underwriters other than itself or as to what was done by or for other underwriters, but admits that copies of certain of the documents set forth in paragraph "Fifth," were submitted to it. Respondent alleges on information and belief, that the approval which the said James F. Taylor gave to the towing of the steamtug "Wash Gray" by the steamship "Freeport Sulphur No. 1," was given without knowledge on the part of the said James F. Taylor that a special contract has been entered into between the libelant herein and the owners of the steamship "Freeport Sulphur No. 1," which provided among other things as follows:

18 "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray."

That, in securing the approval of the said James F. Taylor to the towing arrangements of the said tug "Wash Gray," the libelant, its officers, agents and employees concealed from and failed to disclose to the said James

F. Taylor, that the said contract contained said provision, although the libelant was under the duty of disclosing said fact to the said James F. Taylor. On information and belief that the said James F. Taylor would not have approved the towing arrangements of the said steamtug "Wash Gray," if the existence of the clause above quoted in the said contract of towage had been disclosed to him or if he had had knowledge that the said contract contained the said clause. Respondent alleges that the said Verne Dyer, referred to in the libel herein, was not named or referred to, either directly or indirectly, in the policy which it issued on the steamtug "Wash Gray," and that it is not affected in any manner by any acts done or omitted to be done by the said Verne Dyer.

Sixth: Except as in this paragraph expressly admitted or denied, respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "Sixth" of the libel herein. Respondent admits that it issued and delivered to the libelant herein and to Clyde A. Babrour its certain policy of insurance in the sum of Ten Thousand ($10,000.00) Dollars covering the said
19 steamtug "Wash Gray," as hereinabove set forth, and that the premium charged to the said assured in and by the said policy of insurance issued by the respondent herein was at the rate of one and five-eighths (1-5/8%) per cent of the amount insured, and respondent specifically denies that the ordinary or prevailing rate for vessels built and equipped for a voyage from Tampico to Texas, or other United States Gulf ports, was one-quarter (¼) of one (1%) percent. when said vessels were to be towed.

Seventh: Respondent denies that it has any knowledge or information sufficient to form a belief as to any of the

allegations contained in paragraph numbered "Seventh" of the libel herein, except that the respondent admits that the said steamtug "Wash Gray" sailed from "Tampico" in tow of the steamer "Freeport Sulphur No. 1" on or about June 6, 1922, and sank on or about the 8th day of June, 1922, and except that it denies, on information and belief, that the said tug was properly fitted and equipped for the said voyage and that the said tug was seaworthy either at the commencement of the said voyage or at the time the insurance written by the respondent on the said tug attached.

Eighth: Respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "Eighth" of the libel herein, except that it admits that loss, if any, under its policy, was payable to the assured or order, as interest might appear, and that said insurance policy was written in favor of the libelant and/or Clyde A. Barbour.

20 Ninth: Answering the allegations contained in paragraph numbered "Ninth" of the libel herein, respondent admits that certain documents were furnished to it on or about the 20th day of June, 1922, which purported to be proofs of loss of the said steamtug "Wash Gray," but the respondent denies, on information and belief, that the said documents were good or sufficient proofs of loss and alleges, on information and belief, that the said documents were wholly insufficient as proofs of loss, by reason of the fact, among others, that they did not show that the said steamtug "Wash Gray" had sunk or been lost as a result of perils of the sea or any other peril insured against in the policy of insurance hereinabove mentioned. Respondent denies

that it set up unseaworthiness as a ground for refusing payment and alleges that it has repeatedly invited libelant to submit proofs of loss showing a loss from a peril insured against and that libelant has failed to submit such proofs or any evidence that the vessel was not lost by reason of a peril expressly excepted in the policy. Respondent alleges that the marine surveyor who passed upon the condition of the steamtug "Wash Gray" was the agent in this regard both of the libelant and of the respondent. Respondent admits that, in refusing payment under its said policy covering said steamtug, it gave as one of the grounds of its said refusal the fact that the libelant had concealed and failed to disclose to the respondent, at the time the said policy covering
21 the said tug was issued by the respondent and/or at the time the risk under the said policy was by its terms to attach, the fact that the contract for the towage of said vessel entered into between the libelant and the owners of the steamship "Freeport Sulphur No. 1" contained the following clause:

"Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray."

Respondent denies that it knew at the time of the issuance of the said policy, or the attachment of the risk, or at the time of the loss of the said steamtug, that there was any written contract in regard to the towage of the said steamtug by the steamship "Freeport Sulphur No. 1." Respondent denies, on information and belief, the allegation that the contract of towage entered into between the owners of the steamship "Wash Gray" and the owners of the steamship "Freeport Sulphur No. 1" evidenced nothing more than the usual common terms for towage services between Mexican ports and American Gulf ports.

Tenth: Answering the allegations contained in paragraph numbered "Tenth" of the libel herein, the respondent admits the jurisdiction of the United States and of this Honorable Court, but denies that all and singular the premises are true.

First Affirmative Defense.

For a further and first affirmative defense to the purported cause of action alleged in the libel herein, the respondent alleges and respectfully shows to this Honorable Court as follows:

22

Eleventh: That, on or about the 7th day of June, 1922, the respondent duly issued its certain policy of insurance No. 15,567, wherein and whereby the respondent insured the libelant herein and/or Clyde A. Barbour, on account of whom it might concern, in the sum of Ten thousand ($10,000.00) Dollars on the steamtug "Wash Gray," her body, tackle, apparel, furniture, stores, supplies, engines, boilers, machinery and appurtenances at and from Tampico to Freeport, Texas, in tow of steamer "Freeport Sulphur No. 1" and whilst there and thence in tow of approved tug to Galveston and for twenty-four (24) hours after arrival. That the said insurance was issued at the request and upon the application of the libelant herein and Clyde A. Barbour, in whose joint favor the said policy of insurance herein referred to was issued.

Twelfth: On information and belief that, prior to the issuance of said policy, and prior to the attachment of the risk thereunder, the Compania de Navegacion Interior, S. A., libelant herein, entered into a written contract with the owners of the steamship "Freeport Sulphur

No. 1," wherein and whereby it was agreed that the steamtug "Wash Gray" should be towed by the steamship "Freeport Sulphur No. 1" from Tampico to Freeport, Texas, and that the said contract contained the following clause:

23 "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray."

Thirteenth: That at no time until after the loss of the steamtug "Wash Gray" did the libelants, its officers, agents or servants, know of the fact that a written contract had been entered into for the towage of the steamtug "Wash Gray" by the steamer "Freeport Sulphur No. 1," nor that any agreement had been made for the said towage which contained a provision that the said steamer "Freeport Sulphur No. 1" should not be responsible in any way for loss or damage to the "Wash Gray." That the libelant, its officers, agents and servants failed at all times, until after the loss of the steamtug "Wash Gray," to disclose to the respondent, its officers, agents or servants, that an agreement had been entered into under which the steamship "Freeport Sulphur No. 1" should not be responsible in any way for loss or damage to the "Wash Gray," but the libelant, its officers, agents and servants, wrongfully concealed the said fact from the respondent and from its officers, agents and servants. That the existence in the said contract of towage of the clause above quoted, relieving the steamship "Freeport Sulphur No. 1" from responsibility from loss or damage to the "Wash Gray" was a fact material to the risk insured or to be insured by the respondent herein and the respondent would not have issued the policy of insurance hereinabove referred to, and would not in any way have

insured the said steamship "Wash Gray" for the voyage aforesaid had the said facts set forth above been known or disclosed to the respondent. That by reason
24 of the facts above set forth the said policy of insurance is and at all times has been voidable and the respondent has elected and hereby elects to treat said policy as wholly null, void and of no effect.

Second Affirmative Defense.

For further and second affirmative defense to the purported cause of action alleged in the libel herein, the respondent alleges and respectfully shows to this Honorable Court as follows:

Fourteenth: The respondent realleges each and every allegation contained in paragraphs "Eleventh" and "Twelfth" of this answer.

Fifteenth: That at no time until after the loss of the steamtug "Wash Gray" did the respondent, its officers, agents or servants, know of the fact that a written contract had been entered into for the towage of the steamtug "Wash Gray" by the steamer "Freeport Sulphur No. 1," nor that any agreement had been made for the said towage which contained a provision that the steamer "Freeport Sulphur No. 1" should not be responsible for loss or damage to the steamtug "Wash Gray."

Sixteenth: That the policy of insurance, which is the basis of the present suit, contained the following provisions:

25 "Any agreement, contract or act, past or future, positive or implied by the insured where-

by any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the company's right to retain or recover the full premium shall not be affected."

Seventeenth: On information and belief that the steamtug "Wash Gray," on or about the 6th day of June, 1922, left Tampico, Mexico, in tow of the steamship "Freeport Sulphur No. 1," said voyage and towage being undertaken and carried on under and pursuant to the towage agreement referred to in paragraph "Twelfth" hereof. That the steamship "Freeport Sulphur No. 1," after leaving Tampico on the said voyage, proceeded with the said steamtug "Wash Gray" in tow, at a rate of speed of approximately nine to ten knots per hour, which rate of speed was maintained in spite of the winds, waves and weather conditions encountered on the said voyage. In response to the respondent's demand for proof of loss resulting from sea peril, libelant stated that the "Freeport Sulphur No. 1" was towing the "Wash Gray" too fast and libelant suggested that an action be instituted against "Freeport Sulphur No. 1" and/or her owners for the negligence of "Freeport Sulphur No. 1" in towing the "Wash Gray" at an excessive rate of speed.

Eighteenth: On information received from the libelant, respondent alleges that the rate of speed aforesaid, at which the tug "Wash Gray" was towed by the
26 steamship "Freeport Sulphur No. 1," was grossly excessive under the circumstances, and resulted in submerging the bow of the tug "Wash Gray,"

and, furthermore, in straining the said steamtug, in loosening her towing bitts, opening her seams and otherwise straining, weakening and injuring the said vessel, in such a manner and to such an extent that seawater could and did enter into the hold, engine room and other interior parts of the said steamtug "Wash Gray," causing the said steamtug to sink. That the excessive speed at which the tug "Wash Gray" was towed by the steamship "Freeport Sulphur No. 1" was wholly improper under the circumstances, and the sinking of the steamtug "Wash Gray" was caused either in whole or in part by the excessive speed at which the said steamtug was towed, and said excessively rapid towing was one of the effective, proximate, concurring and efficient causes of the sinking of the said steamtug.

Nineteenth: That, by reason of the facts aforesaid, and in the absence of the clause from the contract of towage quoted in Paragraph "Twelfth" hereof, the steamship "Freeport Sulphur No. 1" would have been liable in rem for all loss and damage sustained through or as a result of the sinking of the steamtug "Wash Gray," and the right to enforce such liability of the said steamship "Freeport Sulphur No. 1" would have passed to the respondent and the other insurance companies which issued policies of insurance on the steamtug "Wash Gray," upon the payment by the respondent and the other said insurance companies of a total loss under the said
27 policies of insurance issued on the said steamtug "Wash Gray" or on the acceptance of an abandonment of the said steamtug. Such right of recovery by the respondent and the said other insurance companies against the said "Freeport Sulphur No. 1" has been released and lost by the agreement which the libelant entered into with the owners of the "Freeport Sul-

phur No. 1,' above set forth, by reason of which fact the policy hereinabove referred to has been rendered null and void as to the amount of the loss or damage sustained by the libelant by reason of or in connection with the sinking of the said steamtug, all as respondent is informed and believes.

Third Affirmative Defense.

For a further and third affirmative defense to the purported cause of action alleged in the libel herein, respondent alleges and respectfully shows to this Honorable Court, on information and belief, as follows:

Twentieth: Respondent realleges each and every allegation contained in paragraphs "Eleventh" and "Twelfth" of this answer.

Twenty-First: That the contract for the towage of the steamtug "Wash Gray," referred to in paragraph "Twelfth" hereof, was entered into on behalf of the libelant herein by Clyde A. Barbour, who is stated in the libel herein to be the President of the libelant and who jointly with the libelant, was the assured under the policy of insurance herein referred to. That
28 the said contract for the towage of the "Wash Gray" by the steamship "Freeport Sulphur No. 1" contained the following clause:

"Your tug 'Wash Gray' will be towed by the steamship 'Freeport Sulphur No. 1' from anchorage inside the jetties at Tampico to anchorage outside the bar at Freeport on the next voyage of the 'Freeport Sulphur No. 1,' which we anticipate will leave Freeport June 1st sailing from Tampico in the afternoon of June 3rd, arriving in Freeport on the morning of June 5th."

Twenty-Second: That, in order to comply with the schedule set forth in the clause from the towage contract quoted in the preceding paragraph, and in order to complete the voyage from Tampico to Freeport between the afternoon of June 3rd and the morning of June 5th, it was necessary for the steamship "Freeport Sulphur No. 1" to proceed and to tow the tug "Wash Gray" at an average speed of nine to ten knots per hour. That the said Clyde A. Barbour and the libelant herein knew that the customary speed at which the steamship "Freeport Sulphur No. 1" would proceed in making the voyage from Tampico to Freeport averaged nine to ten knots per hour.

Twenty-Third: That, on leaving Tampico with the steamtug "Wash Gray" in tow, the steamship "Freeport Sulphur No. 1" proceeded at an average speed of from nine to ten knots per hour, in accordance with its regular schedule speed, which was well known to the said Clyde A. Barbour and the libelant, as above set forth, and that the said speed was continued without abatement
29 in spite of the winds, waves and weather conditions which were encountered on said voyage.

Twenty-Fourth: That the speed at which the tug "Wash Gray" was to be towed and was in fact towed by the "Freeport Sulphur No. 1," was wholly improper under the circumstances and was known to the libelant and to Clyde A. Barbour to be wholly improper. That the sinking of the steamtug "Wash Gray" was caused either in whole or in part by the excessive speed at which the said tug was towed and said excessive speed was one of the effective, proximate, concurring and efficient causes of the sinking of the said steamtug. That the danger to the said steamtug caused by the excessive

speed at which the said tug was towed, was not one of the dangers insured against by the policy of insurance hereinabove referred to, issued by the respondent in favor of the libelant and the said Clyde A. Barbour.

Twenty-Fifth: That, at the time of the issuance of the policy of insurance hereinabove referred to, and at the time the risk under said policy was by its terms to attach, the respondent was wholly uninformed and unaware of the fact that the steamtug "Wash Gray" was to be towed at an excessive rate of speed, as hereinabove set forth, and the respondent would not have issued said policy of insurance and would not in any way have insured the said steamtug "Wash Gray" for the voyage aforesaid, had the facts in regard to the speed at which the said steamtug was to be towed been known or disclosed to the respondent.

Wherefore, respondent prays that the libel herein be dismissed with costs.

(Sig.) DART, KERNAN & DART,
Proctors for Respondent.

State of New York,
County of New York, ss.:

H. E. Reed, being duly sworn, deposes and says: That he is the Assistant Manager of the Atlantic Marine Department of the Fireman's Fund Insurance Company, the respondent herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by deponent and not by respondent is that respondent is a corporation and deponent is the Assistant Manager of the Atlantic Marine Department thereof.

(Sig.) H. E. REED,

Sworn to before me this 11th day of January, 1923.

(Sig.) LOUIS D. BARCHFELD,
Notary Public, New York County No. 448, Register's No. 4218, Commission Expires March 30, 1924.

(Seal)

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32 CERTIFICATE OF JAS A. DONEGAN.

Filed Feb. 3, 1923.

No. 31628 Series B.

State of New York,
County of New York, ss.:

I, James A. Donegan, Clerk of the County of New York and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Louis D. Barchfeld whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and to administer oaths to be used in any Court of said State and for general

purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of Jan., 1923.

(Signed) JAMES A. DONEGAN,
(Seal) Clerk.

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33 INTERROGATORIES TO BE PROPOUNDED TO THE LIBELANT.

First Interrogatory:

Did the libelant enter into a written contract for the towage of the steamtug "Wash Gray" by the steamer "Freeport Sulphur No. 1"? If so, annex a copy of such contract to the answer to this interrogatory and state

(a) The date when such contract was entered into;

(b) The person or persons by whom said contract was negotiated on behalf of libelant.

(c) The person or persons by whom said contract was negotiated on behalf of the steamer "Freeport Sulphur No. 1" or her owner or owners.

(d) Whether said contract was modified, altered or amended by any later or other agreement, contract or understanding.

Second Interrogatory:

Who was the officer or agent of the libelant who directed or arranged for the procuring of the insurance on the "Wash Gray" for the voyage from Tampico to Galveston?

Third Interrogatory:

Did Mr. Clyde A. Barbour state to Mr. T. Catesby Jones of No. 64 Wall Street, New York City, that the tug "Was Gray" was towed at an excessive speed by the steamer "Freeport Sulphur No. 1"?

Fourth Interrogatory:

Did Mr. Clyde A. Barbour suggest to Mr. Jones that the underwriters who had issued policies on the
34 "Wash Gray" for the voyage from Tampico to Galveston should institute suit against the "Freeport Sulphur No. 1" or her owners to recover damages for the loss of the "Wash Gray"?

Fifth Interrogatory:

Did Mr. Clyde A. Barbour state to Mr. Jones that Mr. Barbour's Company, the libelant herein, did not desire to institute suit against the "Freeport Sulphur No. 1" or her owners to recover for the loss of the "Wash Gray," because of the close and/or friendly relations between the libelant and the owners of the "Freeport Sulphur No. 1"?

(Signed) DART, KERNAN & DART.

35 AGREEMENT.

Filed May 11th, 1923.

United States District Court, Baton Rouge Division, Eastern District of Louisiana.

Compania de Navegacion, Interior S. A.
vs. No. 100.
Fireman's Fund Insurance Co.

Agreement.

It is hereby mutually stipulated and agreed by the libelants and defendants, herein duly represented by their undersigned counsel, that the above numbered and entitled cause be transferred from the Baton Rouge Division to the New Orleans Division, for purposes of trial.

It is further mutually stipulated and agreed, that all the evidence taken in this cause may be offered, introduced and filed in evidence in each of the other suits by the libelant herein against the other insurance companies in suits Nos. 101 to 110, both inclusive, of the docket of the Baton Rouge Division of this Court, without the necessity of retaking, or reoffering said evidence, subject to all objections as noted at the time the said testimony was taken.

COMPANIA DE NAVEGACION,
INTERIOR S. A.,
(Sgd.) By JOHN D. & M. A. GRACE,
Proctors for Libelant.

FIREMAN'S FUND
INSURANCE CO.,
(Sgd.) By DART, KERNAN & DART,
Proctors for Defendant.

36 NOTE OF EVIDENCE FOR LIBELANT, TO BE CONSIDERED AS MADE IN EACH ONE OF THE ELEVEN CASES, CONSOLIDATED FOR TRIAL, AS IF SPECIALLY SEPARATELY MADE IN EACH OF SAID SEPARATE CAUSES.

Filed May 31, 1926.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Honorable Louis H. Burns, Judge.

(Titles Omitted.)

Consolidated for Trial: But separate Judgment to be entered in Each Cause.

Note of Evidence for Libelant, to be Considered as made in each one of the Eleven above entitled and numbered Causes, as if Specially Separately made in each of said Separate Causes.

Libelant offers in evidence in the above causes:

1. The depositions of C. A. Barbour, on original and recall, examinations, together with each and every one of the various exhibits offered in evidence during his said examinations; Four letters from C. W. Jungen; signed survey report of Vern Dyer, from W. J. Pulford; and James F. Taylor.

2. Deposition of Charles E. Clarke.

3. Deposition of J. C. Grant, together with each and every one of the various exhibits offered in evidence during his said examination; particularly copy of survey report attached to his said deposition marked Libelant 3 Exh. 6/15/26.

4. Deposition of A. N. Peckham, together with such exhibits offered in evidence during his said examination.

5. Deposition of Mr. Charles Drouet, together with tug boat tariff, marked Libelant's Exhibit No. 2, attached to his deposition, and such other exhibits offered during his examination.

6. Deposition of L. Mims & Copy of towing contract.

7. Deposition of William H. Young, taken on or about Oct. 17, 1923, and exhibits offered during said examination, marked Libelant's Exhibit A 1, A 2, A 3, A 4, A 5; receipt for registered letter return receipt for delivery of same letter. So also, deposition of Wm. H. Young, on recall for libelant, taken May 14, 1926.

37 8. Deposition of James P. Roney.

9. Deposition of Henry A. Adams.

10. Deposition of Lester F. Alexander.

11. Deposition of R. D. Reeves, together with extract from book published in England covering certain English harbors showing custom in re non-liability of towing vessel for any loss or damage to tow.

12. Depositions of Leoncio Carbajal, A. Romero, Verne Dyer, Jesse C. Barbour, Fred Franz, Max Winfields, all taken under commission herein before the U. S. Consul at Tampico, and offer in evidence, also each and every one of the papers, exhibits and documents attached to said respective depositions, particularly affidavit signed by C. G. Haslund, Charles McCauley, Aug. 18, 1922, affidavit signed by C. G. Haslund, September 27, 1922; the sworn declaration of the officers and other members of the crew of the Wash Gray before the United States Consul at Tampico, Mex., June 20, 1922, at the request of Mr. James F. Taylor, Agent of the Insurance Company, the United States Salvage Association and answering the interrogatory of said Mr. Taylor in effect an extended marine protest together with certificate of the Vice Consul of the U. S., to the authenticity of said document; preliminary protest made by the Master of Wash Gray on June 10, 1922, at Freeport, Texas, sworn declaration of the master on August 22, 1922, before the U. S. Vice Consul at Tampico, Mexico, certified extract from the log of the Wash Gray in possession of the Inspector and Port Captain at Tampico, Mex., telegrams from Verne Dyer and J. F. Taylor under date May 11, 1922, and June 2, 1922, reports of survey made by James F. Taylor, report of survey, made by Verne Dyer, copy of contract for towage of Wash Gray.

13. Deposition of Jesse C. Barbour on re-call.

14. Deposition of John D. Grace, and the six letters produced during this examination, initialed by the stenographer—three from the Fireman's Fund Insurance Company; one from each of the following, Aetna In-

surance Co., Hartford Conn., Carpenter & Baker, agents for some of the defendant companies; Wm. H. McGee & Co., Underwriters Agents for certain of defendants.

15. The eleven separate distinct policies of insurance, issued severally—one each—by each one of the following named defendants.

a. Globe & Rutger Fire Insurance Company, No. 392732.

b. Aetna Insurance Co., Hartford, Con., No. 16032.

c. The Franklin Fire Insurance Co. of Philadelphia, Pa. No. 2965.

d. Fireman's Fund Insurance Co. of San Francisco, Calif., No. 15,567.

e. Hartford Fire Insurance Co., Hardford, Con., No. 3080.

f. Northwestern Fire & Marine Ins. Co., Minneapolis, Minn., No. 3097.

g. National Liberty Insurance Co. of American, No. 205 558.

h. The Liverpool and London and Globe Insurance Co., Limited, No. 2147/2876.

i. The Phoenix Insurance Co. of Hartford, Conn., No. 2421.

j. The Western Assurance Company, No. 21609.

k. Springfield Fire & Marine Insurance Co., No. 458.

All defendants in the above entitled and numbered causes.

16. United States Government Charts in relation to the Gulf of Mexico.

17. Charf marked by Master of the S. S. "Freeport Sulphur No. 1", on chart of U. S. Weather Bureau.

18. Deposition Rowland Linfield.

(Sgd.) JOHN D., M. A. & E. H. GRACE,

38 JOHN D. GRACE,

Proctors for Libelant.

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39 DEPOSITIONS OF LEONCIO CARBAJAL, A. ROMERO, VERNE DYER, JESSE BARBOUR, FRED FRANZ, MAX WINFIELD, TAKEN ON BEHALF OF LIBELANT AND EXHIBITS ATTACHED.

Filed May 23, 1926.

Nos. 17,205 to 17,215 Inclusive.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

Compania de Navegacion Interior, S. A., Libelant,

vs.

Fireman's Fund Insurance Company, et al., Defendants.

Questions and answers in deposition of LEONCIO CARBAJAL, witness for libelant, taken under direct and cross-interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. Leoncio Carbajal; 36; Laguna, entre Sol y Gloria, near Tampico, Tamaulipas, Mexico, Seaman.

Second Interrogatory:

Were you employed in the service of the tug "Wash Gray" on the voyage she undertook starting from the city of Tampico, in the Republic of Mexico, bound thence in tow of the Steamship Freeport Sulphur No. 1, to a Gulf Port in the United States, leaving Tampico, Mexico, on or about the sixth day of June, 1922? If you answer yes, then please state in what capacity you served on that occasion.

A. Yes, I was master of the Wash Gray on this voyage.

Third Interrogatory:

State whether or not you saw anything done on board of the said tug "Wash Gray" (before she started out on that particular voyage? If you answer yes, then please state, as fully as you can, everything that was done to your personal knowledge.

A. Before sailing, all doors and windows
40 were closed and boarded up, with the exception of the top half of one of the fire room doors, which left open to permit entrance to the boilers. The seams of the deck were filled with oakum and pitch.

Fourth Interrogatory:

What kind of weather prevailed when you started with the tug "Wash Gray" on the said voyage; and say if there was any change in the weather; if so, when did the change of weather set in; what kind of weather did you then have; and what effect did it have on the tug "Wash Gray"?

A. When we sailed from the Bar at Tampico the weather was very good. On the next day, June 7th, we encountered a fresh wind from the east and a rough sea. On the same day, about eight o'clock, at night the tug began to roll and pitch heavily. Between nine and ten o'clock, on the same day was heard a noise which resembled the grinding of wooden objects. I sent a man down in the hold and he found that the towing bit in the fore-castle head was loose. He remained below about ten minutes.

Fifth Interrogatory:

Did the said steam tug "Wash Gray" complete the above referred to voyage? If you answer no; then state what occurred to prevent her from making the voyage; what it was that happened to prevent her from making the voyage and how it happened.

A. The tug "Wash Gray" sank about one hundred miles southeast of Freeport, Texas, about ten thirty at night of June 7th, the vessel went down by the head, and I immediately sent a man down again to investigate. He discovered that on both sides of the
41 tug some of the seams were open and water was gradually entering through the seams. On June 8th, about 10:00 A. M., the tug sank.

Sixth Interrogatory:

State, so far as you may be able, the condition of the engines, boilers, pumps, steering-gear, water-tanks and

other equipment of the said "Wash Gray" during all of the time you were on board of said vessel on the aforesaid voyage; and state what knowledge you possess about such things and what opportunity you had to determine anything about their condition.

A. The engines were in good condition when we left Tampico, up until the time the water commenced to enter the vessel; the boilers were functioning satisfactorily, furnishing enough steam for all pumps and engines, the steering gear was at all times in good condition; the water tanks and other equipment of the Wash Gray were in good condition during the voyage up until the time the water commenced to enter the tug. About 6:30 P. M., on the night of June 7th, the engineer told me that one of the connections to the boiler was slightly leaking. I made an examination, personally of all the equipment on the said Wash Gray. I am thoroughly familiar with such things, having had about seventeen years experience at sea.

Seventh Interrogatory:

Did you make or sign an extended protest covering the loss of the tug "Wash Gray" on the aforesaid voyage? If yes, then please attach a copy thereof to this deposition and have it marked for identification herewith.

42 A. I made four extended protests concerning the loss of the Wash Gray, one to the Collector of Customs, Freeport, Texas; one to the Mexican Consul, Houston, Texas; one to the American Consul, Tampico, Mexico; and one to the Captain of the Port, Tampico, Mexico. Attached hereto are copies of two affidavits of C. G. Haslund, master of S/S Freeport Sulphur No. 1, made at Freeport, Texas, and Tampico, Mexico; one affidavit of master and crew of tug Wash Gray; two affidavits of Leoncio Carbajal, master

of tug Wash Gray, made at Freeport, Texas, and Tampico, Mexico; copy of log of Wash Gray, made at office of Captain of the Port, Tampico, Mexico.

Cross Interrogatories.

First Cross-Interrogatory:

Please state by whom you are now employed, and how long you have held your present position.

A. I am not working at the present time.

Second Cross-Interrogatory:

Please state what position you held on the Tug "Wash Gray", if any.

A. I was master of the tug Wash Gray.

Third Cross-Interrogatory:

Please state, if you know the size, tonnage, length and beam of the Tug "Wash Gray" at the time she commenced her voyage from Tampico to Freeport, Texas.

A. I do not know exactly the measurements of the tug, as I made no note of them.

Fourth Cross-Interrogatory:

Please state how many lines, if any, were fastened to the Tug "Wash Gray" for the purpose of towing, the size and dimension of said lines, and the length thereof.

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A. There were two lines, each eight inches in circumference. Each line was about seven hundred feet long.

Fifth Cross-Interrogatory:

Please give the names of all of the officers and crew who were on the Tug from the voyage from Tampico to Texas.

A. Leoncio Carbajal, master; A. Romero, engineer; Felipe Trigo, mate; Eusebio Garduno, fireman; Hilario Garcia, fireman; Laurencio Mendez, sailor.

Sixth Cross-Interrogatory:

Please state whether or not the doors of the Tug were broken open while the vessel was passing down the river after leaving the dock at Tampico.

A. No, they were not opened.

Seventh Cross-Interrogatory:

Please state whether any windows on the tug were opened at any time and if so, how many windows were open and under what circumstances.

A. At no time were any of the windows opened with the exception as herein before stated, of the upper half of one of the fire room doors, which was left open to permit entrance to the boilers. When we heard the noise below, we opened the forward hatch to go below and investigate; this hatch was open only during the time the man entered and left the boiler room.

Eighth Cross-Interrogatory:

Please state if you know at what rate of speed the tug was towed by the Steamship "Freeport Sulphur No. 1," from the time she left Tampico until she sank.

A. About eight knots an hour.

44 Ninth Cross-Interrogatory:

Please state what efforts, if any, were made to prevent the inrush of water in the Tug after she commenced to sink.

A. There was nothing done to prevent the inrush of water, as I figured there was nothing that could be done. We used the engine pump and one hand pump in an endeavor to get the water out of the tug.

Tenth Cross-Interrogatory:

Please give full details of all facts within your knowledge concerning the towage and sinking of the Tug, insofar as you may have actual knowledge of the same.

A. This is fully covered in the preceding answers to the direct and cross-interrogatories.

And further this deponent saith not.

(Signed) LEON CARBAJAL,
LEONCIO CARBAJAL,
Republic.

46 The State of Texas,
County of Brazoria.

Before me, E. P. Hoefle, a Notary Public in and for Brazoria County, Texas, on this day personally appeared C. G. Haslund, and Charles McCauley, Captain and First Mate, respectfully [respectively] of the American S. S. "Freeport Sulphur No. 1" to me well known, and who after being by me duly sworn each for himself deposes and says, that, having been shown the statements made by the Captain and Engineer of the Tug Wash Gray, regarding the doors and windows of the said Tug being left open just before the tug started to sink, for the purpose of safe exit in case of sudden sinking of the said tug, and our opinion having been asked regarding this action, we state that under the similar conditions or being placed in the same danger we feel that we would have been justified in leaving these doors open for the sake of our own safety.

(Sgd.) C. G. HASLUND,
Captain, Am. S. S. "Freeport Sulphur No. 1."

(Sgd.) CHAS. McCAULEY,
First Mate, Am. S. S. "Freeport Sulphur No. 1."

Subscribed and sworn to before me this the 18th day of August, A. D. 1922.

(Sgd.) E. P. HOEFLE,
(Seal) Notary Public in and for Brazoria County, Texas, U. S. A.

47 Republic of Mexico,
State of Tamaulipas,
City of Tampico.

Before me the undersigned authority, on this date personally came and appeared, C. G. Haslund, who being duly sworn, deposes and says upon his oath.

I am the master of the S. S. "Freeport Sulphur No. 1." The tug Wash Gray, was in tow of my ship when she sank, on or about June 8th, 1922.

The weather had been fair all the time since leaving Tampico, until the tug sank,—that is, no heavy weather was encountered. The log of the ship on the day of the 7th of June 1922, shows that at 8:00 P. M., there was squally weather with small swells, and that at 11:30 P. M., there were light easterly winds, small swells and frequent showers. However, what is a light and moderate swell aboard a three thousand ton ship could be considered as heavy weather aboard an eighty foot tug-boat, being towed at the rate of nine miles per hour.

(Sgd.) C. G. HASLUND,
Master "Freeport Sulphur No. 1."

Subscribed and sworn to before me, William L. Beaulac, Vice Consul of The United States of America, at Tampico, on the 27th day of September, 1922.

(Signed) WILLIAM L. BEAULAC,
(Seal) Vice Consul of the United States of America, Tampico Mexico.

American Consular Service Fee stamp for $2.00.

* * * * * * * *

49 The undersigned in our character crew of the Mexican Tug Wash Gray at the request of Mr. James F. Taylor, Agent of the insurance company the United States Salvage Association and answering the interrogatory which has been presented to us, declare:

That the sixth day of June, 1922, after having aboard all the necessary papers to commence the voyage to the port of Galveston, Texas, as well as having had the vessel fumigated, we were towed to the middle of the river by a launch to await the passage of the American Tank Steamer, "Freeport Sulphur No. 1" which was to tow us to Freeport Texas, from which place we would afterwards be towed by another vessel to Galveston, Texas. The point of our final destination.

That on the arrival of the Freeport Sulphur No. 1, which found us in the middle of the river, she threw us two manila cables for towing, which we attached to our tug to make the anticipated voyage. That once completed the operation above referred, to a careful detailed inspection was made of the navigable condition of the vessel. That it having been perfectly ascertained that all of the doors, windows and openings were found closed to prevent the entrance of water into the interior of the vessel, and that there was only one small door remaining open in the upper part leading to the engine room, and that the insurance inspector conceded that those in charge of the tug could decend by means of a hand ladder, and having seen that all was in good condition, and that life savers, fuel, water and all necessary for going to see was found aboard, instructions were given to the Captain of the Freeport Sulphur No. 1, to begin the voyage, leaving the jetties at 16.45 of the same day, sixth, going in the direction of the port

of Freeport, Texas, and following the direction of the vessel which towed and navigating with a free east wind. That from the time of leaving the jetties the weather was good until twenty hours on the seventh then there commenced to blow a fresh breeze which caused the Wash Gray to pitch and receive heavy seas. That in view of the situation which was presented, the Captain ordered the mate to inspect condition of the bitts of the tow and the holds to ascertain their condition, the result of this inspection being that the bitts were loose and the bases were found open and the water was entering into the hold. The leaks being dangerous for the vessel in view of which the Captain ordered the engineer to start the pumps to throw out the water proceeding at 22 o'clock to repair the bitts. At the same time the Mate was ordered to go below into the hold to see if the water was reduced with the result that he noted the water was increasing instead of diminishing, thus putting the vessel in danger. That at twenty-three o'clock and thirty minutes the "Wash Gray gave a heavy plunge which caused all the water which was in the hold to pass to the prow causing the vessel to lose her balance and it being considered difficult that she would regain her normal position signals were made to the towing vessel to stop and the towing cables were cut in order to save the vessel. That five minutes after cutting the cables the Freeport Sulphur No. 1 came alongside the "Wash Gray" and the Captain of the former vessel was informed that such were the conditions that it was deemed impossible to continue the voyage with the Wash Gray in tow. That at this time all of the pumps of the Wash Gray were at work trying to pump out the water, but as it was found impossible to keep out the water and as each moment increased the danger for the crew aboard the

Wash Gray, the Captain of the Freeport Sulphur No. 1 was asked to transfer them aboard his ship, which was done immediately, the Freeport Sulphur No. 1 lying off at watch a short distance until 5 o'clock of the eighth when a boat was sent with the Engineer and six of the crew to inspect again the condition of the Wash Gray having found plenty of fuel but no water for the boiler as this had escaped due to the jarring of the vessel. The boiler tubes and the nipples at the base of the level of the water having been the
51 cause of the loss of much water. Then the "Freeport Sulphur No. 1" with the crew of the Wash Gray on board went alongside of the latter furnishing a cable as well as water for the boiler by means of a hose, with which those of the crew which had been sent to make an inspection commenced to make a fire in an endeavor to raise steam. While the engineer was trying to raise steam, the balance of the crew with hand pumps were trying to save the vessel, which was finally found to be impossible, as the water entered faster than it was pumped out, to the extent that it came up to the fire box of the boiler and extinguished the fire, making it impossible to raise steam for which reason it was found necessary to abandon the "Wash Gray" transferring all of the crew which had been ordered to be saved. That at six o'clock of the same day, the eighth the Freeport Sulphur No. 1 continued towing the Wash Gray at a velocity of one mile per hour; but nowithstanding this, at ten o'clock and thirty minutes the Wash Gray began to sink and a few minutes afterwards completely disappeared, the towing cables having been cut. That with respect to the question asked by the insurance Inspector Mr. Taylor if it is true that the doors and windows of the Wash Gray were open when this was being towed past the Fiscal

Wharf, I stated that such is not true, as when the Freeport Sulphur No. 1 was notified that she was in condition to be towed all of the doors and windows were convenient closed, and there only remained open the upper part of the door communicating with the engine room, the precaution having been taken after leaving La Barra to refasten the doors and windows.

That this declaration is made under solemn oath to state the truth to be certain of the acts declared, as can be proven by the captain of the Freeport Sulphur No. 1, and by the Doctor who fumigated the "Wash
32 Gray."

Tampico Tamps. June 16th, 1922.

LEONCIO CARBAJAL,
The Captain,
J. A. ROMERO,
The Engineer,
FELIPE TRIGO,
The Mate,
EUSABIA GURDUNIO,
Fireman,
For Hilario Garcio who cannot write,
EUSABIA GARDUNIO,
Fireman,
LAURENCIO MENDEZ,
Sailor.

Subscribed and sworn to before me, Willard L. Beaulac, Vice Consul of the United States of America, at Tampico, Mexico, on this 20th day of June, 1922.

(Signed) WILLARD L. BEAULAC,
Vice Consul of the United States of America, Tampico, Mexico.

53 United States of America,
The State of Texas, ss.

City and Port of Freeport.

Be it remembered that on this 10th day of June A. D. 1922, before me the undersigned authority personally appeared Leoncia Carbajal, Master of the Mexican Steam Tug "Wash Gray" of the burden of 160.46 tons or thereabouts, who declares that he set sail in and with said vessel from Tampico, Mexico, on June 6th, 1922, in tow of the American S. S. "Freeport Sulphur No. 1" crossing the bar at 5:45 p. m. destined for Galveston, Texas.

Weather fair. Everything went well until 8 p. m. June 7th, strong breeze developed and tug began pounding and some of the seams seemed to be opening in the meantime the Engineer started the pumps.

At 10 p. m. the water in the tug rolled to the bow causing Tug to go down by the head and seemed not to want to come up and I ordered the tow line cut to save the tug, as soon as line was cut her head came up and the boat righted herself. Before cutting the line we signalled the Freeport Sulphur No. 1 to stop. In about 15 minutes the S. S. Freeport Sulphur No. 1 came along side to ascertain the trouble and I told the Master of Freeport No. 1 that the tug was making water and would not stand further pulling. All the pumps were working while I was talking to the Captain of F. S. No. 1, but the water was gaining, the night looked bad and at 2:45 a. m. I asked the Captain of No. 1 to take us off as we were fearful of losing our lives. The "F. S. No. 1" stood by until daylight. At daylight the Captain of "F. S. No. 1" sent his first Mate and Chief Engineer with six men on board the Wash Gray to ascertain condition and do what they

Transcribe for full and complete copy

could to save her. They found plenty of fuel oil, but not water in the boiler. Then the "F. S. No. 1" put hose over and filled the boiler. The men then cut wood from the house to build fire under the boiler while the Chief engineer of the "F. S. No. 1" was trying to get up steam the others were pumping water out with hand pumps, but could not pump fast enough to keep water down and suddenly the water put the fire out. At this time the Captain of "F. S. No. 1" asked the chief how he was progressing and the Chief replied that the fires were out and that there was no use trying any further and that they had better leave the tug. After all men were aboard the "F. S. No. 1" the steamer proceeded under very slow speed about one mile per hour this was 10 a. m., June 8th, at 10:30 a.m., the tug began to sink slowly and completely disappeared in a few minutes. Before the tug sank the "F. S. No. 1" came to a complete standstill and as the tug went down the Captain of the S. S. "F. S. No. 1" ordered hawser cut.

54

And premises considered the said Master of the Tug "Wash Gray" hereby gives notice of protesting and causing this note or minute of all and singular the premises to be entered in this register, reserving unto himself the right to extend the same at any time or place.

(Signed) LEONCIO CARBAJAL,
Master of Mexican Tug "Wash Gray."

Thus done and protested before me on this the 10th day of June, A. D. 1922.

(Signed) E. P. HEEFLE,
Notary Public in and for
Brazoria County, Texas.

55 Tampico, Tams., Mexico, August 22nd, 1922.
Republic of Mexico,
State of Tamaulipas, ss.
City of Tampico.

I the undersigned, Leoncio Carbajal, Captain of the Mexican Tug Wash Gray solemnly declare: That on the 6th day of June, 1922, the Wash Gray sailed from the Port of Tampico, Mexico, destined for Galveston, Texas, that the said tug was towed by the S. S. Freeport Sulphur No. 1. That, I, as Captain made a complete examination of the Tug, immediately after sailing to see that all the doors and windows were closed, so that no water could enter into the vessel. That I found that all the doors and windows were conveniently closed except for a small opening in the upper part of the door leading down into the engine room, which opening was permitted by the Insurance Inspector. That all the doors and windows were closed during the entire voyage of the said tug Wash Gray, up until about 7:30 p. m. of the second day, June 7th, 1922, when it was found that the tug was making quite a bit of water and that there was quite a bit of danger to the crew. Then the fastenings from the doors were removed and they were allowed to swing freely so that in case the boat should sink the crew could escape and not be trapped with the doors and windows nailed and no means of escape available.

I further state, that though the fastenings were removed the doors still remained closed except for the motion of the boat causing the doors to occasionally swing open and shut as the case might be. However the condition of the weather was such that no water entered the boat through these doors.

(Signed) LEONCIO CARBAJAL,
The Captain.

Subscribed and sworn to before me, Willard L. Beaulac, at Tampico, Mexico, on this 22nd day of August, 1922.

WILLARD L. BEAULAC,
(Seal) Vice Consul of the United States of America.

56 June 6th, 1922. The National Tug "Wash Gray" left Tampico, Tamps., jetties towed by the American Tanker "Freeport Sulphur No. 1" at 5:45 p. m., the direction of the Freeport Sulphur being north northwest with destination Galveston, U. S. A., and free eastern wind blowing. At 7:55 the light house at Punta Jerez was on sight. Utmost economy in fuel for the engine, dynamo not running to pump. June 7, 1922. Weather was stormy free eastern wind blowing. At 5:45 the first days run was ended at 24 o'clock of the same day, the 7th, the condition of the Gray on the 7th from 8 p. m. on was very bad, water was coming in in increasing quantities and always pumping the wells (which inclosed the ship's pumps) and her crew always on the job. This book was showed to me on June 12, 1922, at 11:30. The chancellor in charge (sgd.) Antonio X. Cavazos. On the margin a seal reading Consulate of the United States of Mexico, Houston, Texas, the National Code in the Center. Signed Leoncio Carbajal, Captain.

This is a true and exact copy taken from its original which I do hereby certify.

Tampico, Tamps., June 26/22.
The Inspector and Port Captain.
(Sgd.) B. LAZZERI.

Verified.
Fc. Gonzalez y L.

57 (Titles Omitted.)

Questions and answers in deposition of A. ROMERO, witness for libelant, taken under direct and cross-interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. A. Romero; 38; 74 Calle Rivera, Tampico, Tamaulipas, Mexico; machinist.

Second Interrogatory:

Were you employed in the service of the tug "Wash Gray" on the voyage she undertook starting from the city of Tampico, in the Republic of Mexico, bound thence in tow of the Steamship Freeport Sulphur No. 1, to a Gulf Port in the United States, leaving Tampico, Mexico, on or about the sixth day of June, 1922? If you answer yes, then please state in what capacity you served on that occasion.

A. Yes. Chief Engineer.

Third Interrogatory:

State whether or not you saw anything done on board of the said tug "Wash Gray" (before she started out on that above referred to voyage), to better fit her for that particular voyage? If you answer yes, then please state as fully as you can, everything that was so done to your personal knowledge.

58 A. Yes. Everything was in good shape. All the hatches, doors, and windows were nailed down, with the exception of the upper part of one of the doors above, which was left open in order that we might see into the boiler room.

Fourth Interrogatory:

What kind of weather prevailed when you started with the tug "Wash Gray" on the said voyage; and say if there was any change in the weather; if so, when did the change of weather set in; what kind of weather did you then have; and what effect did it have on the tug Wash Gray?

A. When we left Tampico the weather was moderate with a southeasterly wind blowing; on the night of June 7th about 9 or 10 o'clock a strong wind commenced blowing. About this time the boat began pitching, causing the forward bits to work loose.

Fifth Interrogatory:

Did the said steam tug "Wash Gray" complete the above referred to voyage? If you answer no; then state what occurred to prevent her from making the voyage; what it was that happened to prevent her from making the voyage and how it happened.

A. No. The tug Wash Gray sank in the Gulf of Mexico about half way between Tampico, Mexico, and Freeport, Texas, on the morning of June 8, 1922, at about 10:30 a. m. When the forward bits worked loose this caused the seams of the boat to open, permitting water from the sea to enter. The water entered the tug faster than was possible to pump it out.

59 Sixth Interrogatory:

State, so far as you may be able, the condition of the engines, boilers, pumps, steering-gear, water-tanks, and other equipment of the said "Wash Gray" during all of the time you were on board of said vessel on the aforesaid voyage; and state what knowledge you possess about such things and what opportunity you had to determine anything about their condition.

A. The engines were in good condition, not being used on this trip; when we left Tampico the boilers were in first-class condition and remained so; the syphons and pumps were in good working condition until the tug sank; the steering gear was at all times in excellent condition; the remainder of the equipment of the tug was in good condition, including life boats, etc. I have had about nineteen (19) years' experience as marine engineer, and in such capacity I am in a position to have a thorough knowledge about such things.

Seventh Interrogatory:

Did you make or sign an extended protest covering the loss of the tug "Wash Gray" on the aforesaid voyage? If yes, then please attach a copy thereof to this deposition and have it marked for identification herewith.

A. Yes, we made four protests: One to the Collector of Customs, Freeport, Texas; one before the Mexican Consul, at Houston, Texas; one before the Captain of the Port, Tampico, Mexico, and one before the American Consul, Tampico, Mexico.

60 Cross Interrogatories.

First Cross Interrogatory:

Please state by whom you are now employed, and how long you have held your present position.

A. Transcontinental Petroleum Company, Tampico, Tamaulipas, Mexico; commenced work with them about three months ago.

Second Cross Interrogatory:

Please state what position you held on the tug "Wash Gray," if any.

A. Chief Engineer.

Third Cross Interrogatory:

Please state, if you know the size, tonnage, length and beam of the tug "Wash Gray" at the time she commenced her voyage from Tampico to Freeport, Texas.

A. I do not remember as I naturally did not take measurements of the tug. This can be secured from the office of the Captain of the Port, Tampico, Mexico.

Fourth Cross Interrogatory:

Please state how many lines, if any, were fastened to the tug "Wash Gray" for the purpose of towing, the size and dimension of said lines, and the length thereof.

A. Two lines, about two inches in diameter, about 6 inches in circumference; they were about 500 or 600 feet, I would imagine.

Fifth Cross Interrogatory:

Please give the names of all of the officers and crew who were on the tug from the voyage from Tampico, to Texas.

A. Leoncio Carbajal, master; A. Romero, Chief Engineer; Felipe Trigo, Quartermaster; Eusebio Garduno, fireman; Hilario Garcia, fireman; Laurencio
61 Mendez, sailor.

Sixth Cross Interrogatory:

Please state whether or not the doors of the tug were broken open while the vessel was passing down the river after leaving the dock at Tampico.

A. Everything was nailed down with the exception of the upper part of one of the doors (as mentioned hereinbefore) to permit the entrance to the boiler room by the engineer and fireman.

Seventh Cross Interrogatory:

Please state whether any windows on the tug were open at any time and if so, how many windows were open and under what circumstances.

A. None of the windows were open at any time.

Eighth Cross Interrogatory:

Please state if you know at what rate of speed the Tug was towed by the Steamship "Freeport Sulphur No. 1" from the time she left Tampico until she sank.

A. I would think about seven or eight knots per hour. When we were attempting to save the tug from sinking we were towed at the rate of about one mile per hour.

Ninth Cross Interrogatory:

Please state what efforts, if any, were made to prevent the inrush of water in the Tug after she commenced to sink.

A. All the pumps and siphons were working in an endeavor to pump the water out.

Tenth Cross Interrogatory:

Please give full details of all facts within your knowledge concerning the towage and sinking of the Tug, insofar as you may have actual knowledge of the same.

A. This is fully covered in the answers to
62 the direct and cross-interrogatories hereinbefore given. And further this deponent saith not.

(Signed) A. ROMERO.

A. ROMERO.

63 (Titles Omitted.)

Questions and answers in deposition of VERNE DYER, witness for libelant, taken under direct and cross interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. Verne Dyer; 52 years; Tampico, Mexico; Marine Surveyor.

Second Interrogatory:

Were you, prior and down to the sixth day of June, 1922, acquainted with the physical condition of the steam tug "Wash Gray," her tackle, apparel and equipment? If yes, then please state what you know about her and about her tackle, apparel and equipment, especially during said period of time; and state what your experience has been which enables you to so testify.

A. On May 10, 1923, in my capacity as surveyor to underwriters agent, I made a very thorough examination of this vessel throughout, including the tackle and equipment. I have about thirty years experience in these matters.

Third Interrogatory:

State whether or not you saw anything done on board of the said "Wash Gray," to better fit her for the voyage she undertook from the city of Tampico, in the Republic of Mexico, in tow of the Steamship Freeport Sulphur No. 1, bound thence to a Gulf Port in the
64 United States, commencing said voyage on or about the sixth day of June, 1922.

A. Refer to attached survey, dated May 10, 1922.

Fourth Interrogatory:

If you answer yes, to the preceding question, then please state what, to your personal knowledge, was done on board of said vessel to better fit her for said voyage; under whose direction it was done; what extra equipment, if any was installed on board of said tug and for what purpose.

A. Answer to this question is covered by above-referred to survey.

Fifth Interrogatory:

Do you know what quantity of boiler water was carried on board said tug as she started on said voyage? If yes, please state what quantity and where stowed.

A. No.

Sixth Interrogatory:

Did you see the said tug commence said voyage? If yes, please state what was her condition then, as observed by you, especially concerning her fitness, for the said voyage on which she started.

A. No.

Seventh Interrogatory:

Please state fully in what profession or business were you employed during the months of May and June, 1922, and for how long a period of time have you been so employed; and in giving the names of the Association, Board, Company or individual, please designate where such Association, Board, Company or individual is located or resides, and in what business it is

65 employed.

A. Marine surveyor and appraiser, port works engineer; surveyor to Lloyd's Agent, to the New York Board of Underwriters, Correspondent General

Marine Insurance Agencies, and the Lloyd's Register having had about twenty-two years connection with the above mentioned association.

Eighth Interrogatory:

Please state fully what experience you have had in preparing or directing preparation of vessel to be taken in tow; and in what capacity were you so engaged.

A. General experience for about twenty-two years, acting as Marine Surveyor to direct the proper preparation of vessels to be taken in tow in the interests of both the owners and the underwriters.

Ninth Interrogatory:

What relations have your services, if any been rendered in connection with insurance to be effected or effected on vessels to be towed; or with insurance Companies, Boards, Associations, etc., in respect to vessels to be put in condition to be taken in tow. Please give period and character of such experience.

A. See answers to the preceding interrogatory. My duties have been solely to report on the physical condition of the vessels to be towed.

Tenth Interrogatory:

If in answer to the foregoing interrogatory (10th) you say you have had such experience; then please state what you understand by the terms "vessel and towing arrangements."

A. See answer to the preceding interroga-
66 tory.

Eleventh Interrogattory:

Are your services called for with respect to arrangements to be made for towing vessels at sea or else-

where? If yes, then state about how often you have served in such capacity; and whether or not when the vessel and towing arrangements are subject to your approval, whether or not it is necessary that the towage contract must be submitted to you with respect to anything therein contained?

A. My services are never called in connection with any contracts to be made for the actual towing. It is not customary for me to know anything whatsoever regarding the actual terms of the contract for towing.

Twelfth Interrogatory:

If you are familiar with the terms and conditions usually entered into in contracts for towage services between Gulf Ports, then please state during what period of time such knowledge extends, and between what ports and at what ports.

A. I sometimes learn the terms of the towing contract, but only in a casual manner and not as a part of my official duties.

Thirteenth Interrogatory:

If you have personal knowledge of the usual terms and conditions of both verbal and written agreement for towing water-craft, in and between, Gulf Ports, then state whether or not it is usual to agree to the following terms, to-wit:

(1) The towing vessel will furnish hawser. All other risk and expense to be borne by the vessel towed.

(2) The towing vessel is not responsible in any way for loss or damages to the vessel towed.

67 If you answer that it is usual in both verbal and written agreements to make such stipula-

tions as above mentioned (1 and 2), then please state what is the usual, general acceptance, by owners of vessel towing and being towed, of the said agreements (1 and 2)—what it is they understand thereby.

A. The customary terms for towage from Tampico to any Gulf Ports in the United States stipulate: That a towing vessel will furnish the hawsers but that said towing vessel does not assume any responsibility for less or damage to the vessel towed . These terms are generally understood clearly by both interested parties.

Fourteenth Interrogatory:

Did you issue or execute, or were you furnished with a certificate, or certificates of seaworthiness, and or any other certificates or advices approving the said vessel "Wash Gray," and towing arrangements? If yes, then please attach hereto such certificate and or certificates, or copies thereof, and have them marked for identification herewith.

A. I issued a certificate of seaworthiness for this tug "Wash Gray" to be towed from Tampico to any Texas port, said certificate being numbered 14/22, dated May 10, 1922, four-thirty p. m. Original of this certificate delivered to the owner.

Fifteenth Interrogatory:

Please attach hereto copies of any telegram, letters or other document, issued or executed by you bearing upon the approval of said tug "Wash Gray" and towing arrangements for the aforesaid voyage.

68 A. The owner holds original of my telegram dated June 2, 1922, addressed to Messrs. Adams & Porter, insurance agents of New York, and containing my approval of the condition of the Wash Gray.

Sixteenth Interrogatory:

State every other fact or thing within your personal knowledge bearing upon the fitness of said tug "Wash Gray" and towing arrangements for the aforesaid voyage as fully as if in detail questioned in relation thereto.

A. In my opinion the Wash Gray left Tampico in firstclass seaworthy condition to be towed to Galveston, Texas, under ordinary conditions of weather and sea. Every requirement as usually demanded by insurance representatives having been fulfilled.

Cross Interrogatories.

First Cross-Interrogatory:

Please state at whose request you examined the Tug "Wash Gray," the nature of your examination, and who was present when you examined her.

A. Examination was made at request of owner. Examination was made with view to ascertaining seaworthiness of vessel to be towed. Owner was present, together with several of his employes.

Second Cross-Interrogatory:

Please state whether you had any knowledge of the terms, or of the existence of the contract for the towing of the Tug "Wash Gray" from Tampico to Texas.

A. No knowledge whatsoever.

69 Third Cross-Interrogatory:

Please state whether any towing contract was ever mentioned to you and if so, with whom you had such conversation and the nature of the same.

A. No actual contract was ever mentioned to me, but in the course of general conversation the owner remarked to me that he was hopeful of securing one of

the East Coast steamships to tow the Wash Gray to Galveston under some arrangement to be made later.

Fourth Cross-Interrogatory:

Please state whether the vessel was examined by you on dry dock or out of the water.

A. Vessel was examined by me in the water, afloat.

Fifth Cross-Interrogatory:

If you have answered that you were employed to make an examination of the Tug Wash Gray, please state by whom you were employed and from whom you received your compensation.

A. Employed and paid by owner of tug.

And further this deponent saith not.

(Sgd.) VERNE DYER.

(Sgd.) VERNE DYER.

70 WESTERN UNION TELEGRAM.

Copy.

Receiver's No. .....

Class of service desired—Telegram.

1922 May 11 PM 12 30.

A100G 22 Via Galveston

Tampico NFT May 132 10.

Sr. Adams and Porter,

15 William St., New York.

NY.

Wash Gray ready for sailing vessel seaworthy and approved also towing arrangements approved carries steam and crew date of sailing furnished later.

J. F. TAYLOR.

Time of receipt shown of this message is eastern standard time.

71 WESTERN UNION TELEGRAM.

Copy.

Receiver's No. .....

Class of service desired—Telegram.

1922 May 11 p m 2 27.

A158G 22 Via Galveston
Tampico Nft 11

Adams and Porter,
15 William St.,
New York, N. Y.

Wash Gray ready for sailing vessel seaworthy and approved also towing arrangements approved carries steam and crew date of sailing furnished later.

VERNE DYER.

Time of receipt shown on this message is eastern standard time.

72 WESTERN UNION TELEGRAM.

Receiver's No. .....

Class of service desired—Telegram.

1922 Jun 2 pm 11 00.

B670CH 12 Via Laredo Jct.
Tampico Tams NFT 2

Adams and Porter,
27 William St.,
New York, N. Y.

Wash Gray towed Steamer Freeport Sulphur Number One approved sailing June third.

JAMES F. TAYLOR.

Time of receipt shown on this message is eastern standard time.

73 United States Salvage Association Inc.
Tampico, Mexico.

May 10th, 1922.

Seaworthiness.
May 10th, 1922.

"Wash Gray."

Report of survey made by the undersigned Surveyor, of the United States Salvage Association, Inc., on May 3rd, 1922, and subsequent dates, at the request of J. C. Barbour of the Cia de Navegacion Interior, S. A., owners of the vessel Wash Gray, 105. 25 gross tons 1935 official number Ramon Buda Master, while she lay afloat along side of the dock of said Company, in order to examine and report upon condition of her seaworthiness, in regards to being towed from the port of Tampico, Mex., to the port of Galveston, Texas, for dry docking and repairs. For detail of recommendations, see report as follows:

Upon examination found:	Recommended:
1. Both forward bitts open at deck.	To be caulked and made water tight.
2. All seams on forward main deck open back to wheel house.	To be caulked and made water tight.
3. All seams on after main deck open, to after end of wheel house.	To be caulked and made water tight.
4. Cargo and coaling ports open.	To be planked over and made tight.
5. All windows and doors in lower wheel house open.	To be planked over and made tight, and doors fastened secure.

All dirt in bilges to be removed, and vessel made clean, so syphons, pump can have free suction. Steam to be raised on the boiler and head of steam kept till vessel reaches the port of Galveston.

Pumps and syphons to be worked in the presence of Surveyor before vessel leaves this port.

The undersigned visited the vessel after all recommendations were carried out, and found vessel, on this 10th day of May, 1922, in a seaworthy condition, and fit to be towed to the port of Galveston, Texas.

(Sgd.) JAMES F. TAYLOR,
Surveyor.

74 United States of Mexico. Department of communications and Public Works. Division of Ports, Light Houses and Merchant Marine. The Undersigned Inspector and Port Captain in accordance with the Regulations for Naval and Engine Inspectors, of March 26, 1918, does hereby certify: that the engine and boiler of the tug "Wash Gray," matriculated in Tampico, of a tonnage of 217.01 gross tons, owned by the Compania de Navegacion Interior, S. A., has been inspected afloat and the following characteristics were found: Type: 2-2 cylinder engines of high pressure each, vertical inverted with condensation of surface, 300 H. P. revolutions per minute, 150. Number of floors 2. Cylinders 2 each with 280 m/m diameter: Piston stroke 350 m/m; type of distribution valves "shell." Diameter of the piston rings 45 m/m; diameter of the trunnion of the crank 152 m/m diameter of the bolts of the crosses 33 m/m; diameter of the crank shaft 152 m/m; main bearings three on each engine; made by Hedgewal, New Albany, Indiana, U. S. A., number of propellers 2; stroke

and diameter 2.75x1.83 meters. Main condenser; surface type. Has no auxiliary condenser. Number of tubes 620 of 19 m/m in diameter each; cooling surface 11.16 square meters. Air pump 1 of 255 m/m in diameter by 356 stroke; circulation pump 1 of 191 m/m in diameter by 356 stroke; number and type of boilers 1 multitubular, cylindrical, horizontal of return flame; pressure 10.33 kilos per square cm. Safety valves 1 of spiral spring 76 cms. in diameter. Length 3.05 meters. Diameter 2.74meters; furnace 2. Fuel; oil; 2 Bethlehem burners. Diameter of ordinary tubes 64 m/m. Diameter of stay tubes 64 m/m. Length of tubes 1.96 meters; heating surface 115.85 square meters; mesh surface 42,840 square meters; main feed pump; 1 of 152 x 100 x 152 m/m. Auxiliary feed pump 1 of 152 x 100 x 152 m/m. Well pumps 3 ejectors; fuel pumps 2 of 115 x 70 x 100 m/m. Consumption by H. P. and hour 425 grms. Consumption by hour 250 kilos; consumption in a day's run 6000 kilos. Drinking water tanks 1 of 5000 kilos; feed water tanks 1 of 15,000 kilos; dynamos 1 of 5 k. g. The condition of the engine, boiler and other apparatus connected with them gave credit to the vessel to navigate in good condition. I do hereby certify in accordance with the regulation above mentioned and meantime it is recognized by the Inspector of Engines in the Atlantic, I issue the present in Tampico, Tamps., on May 23, 1922. The First Naval Engineer, sgd., Luis Pina. The Inspector and Port Captain, sgd. Siuno Lazzeri. A seal reading: Inspection of Ports, Light Houses and Merchant Marine. United States of Mexico. The national code in the center. Benew; one 50c stamp canceled with a seal reading: Inspection of Ports, Light Houses and Merchant Marine. United States of Mexico. The national code in the center. Port Captaincy, Tampico, Tamps.

This is a true and exact copy taken from its original, which I do hereby certify.

Tampico, Tamps., June 26, 1922. The Inspector and Port Captain.

(Signed) B. LAZZERI.

Verified.
Fco. Gonzalez y L.

75 Freeport Sulphur Company.
Freeport, Texas.

May 18, 1922.

Capt. C. A. Barbour,
1st Natl. Bank Building,
Houston, Texas.

Dear Capt. Barbour:

This will confirm our verbal agreement under which it is agreed that your tug, "Wash Gray" will be towed by S. S. Freeport Sulphur No. 1 from anchorage inside the jetties at Tampico to anchorage outside the Bar at Freeport on the next voyage of the Freeport Sulphur No. 1, which we anticipate will leave Freeport June first, sailing from Tampico on the afternoon of June 3rd arriving at Freeport on the morning of June 5th.

The price for the service will be $1200.00.

The Freeport Sulphur Number 1, will furnish hawser.

All other risk and expense to be borne by the tug.

It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps.

S. S. Freeport Sulphur No. 1 is not responsible in any loss or damage to the "Wash Gray." Invoice will be mailed to you at Houston upon completion of the service; otherwise no charge will be made.

It is understood you will furnish the necessary Customs and Consular papers for the tug, and bear all part charges and expenses assessed against, or on account of handling the tug.

Yours truly,

(Signed) F. MIMS.

76 (Titles Omitted.)

Questions and answers in deposition of JESSE BARBOUR, witness for libelant, taken under direct and cross-interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. Jesse Barbour; 27 years; Tampico, Mexico; Vice President and General Manager of Compania de Navegacion Interior, S. A.

Second Interrogatory:

Were you, prior and down to the sixth day of June, 1922, acquainted with the physical condition of the steam tug "Wash Gray," her tackle, apparel and equipment? If yes, then please state what you know about her and about her tackle, apparel and equipment, especially during said period of time; and state what your experience has been which enables you to so testify.

A. Yes. Vessel was in good condition, having been repaired about November, 1920. Have been building vessels and bringing them to Mexico for past ten years.

Third Interrogatory:

State whether or not you saw anything done on board of the said "Wash Gray," to better fit her for the voy-

age she undertook from the city of Tampico, in the Republic of Mexico, in tow of the Steamship Freeport Sulphur No. 1, bound thence to a gulf Port in the United States, commencing said voyage on or about
77 the sixth day of June, 1922.

A. We followed recommendations of surveyors as follows: Both forward bits were caulked and made water-tight; all seams in the forward main deck were caulked and made water-tight. All coaling ports were planked over and made water-tight; all windows and doors in lower wheel house and all of cabin were planked and made water-tight; all dirt in bilges was removed and vessel made clean; steam was raised and all syphons were worked in the presence of surveyors before the vessel left for sea. We also placed a six by four by six pump aboard the Wash Gray to be used in case of emergency, life boat was also placed on stern of Wash Gray. An 800 pound anchor was placed on board with about 500 feet of rope. Steam was raised before vessel left.

Fourth Interrogatory:

If you answer yes, to the preceding question, then please state what, to your personal knowledge, was done on board of said vessel to better fit her for said voyage; under whose direction it was done: what extra equipment, if any was installed on board of said tug and for what purpose.

A. See answer to the preceding interrogatory.

Fifth Interrogatory:

Do you know what quantity of boiler water was carried on board said tug as she started on said voyage? If yes, please state what quantity and where stowed.

A. Approximately 100 barrels of fresh water for drinking and for the boilers was placed on board in water tanks in the forward hold directly below lower wheel house.

78 Sixth Interrogatory:

Did you see the said tug commence said voyage? If yes, please state what was her condition then, as observed by you, especially concerning her fitness for the said voyage on which she started.

A. Yes. Fit for sea and generally in good condition.

Seventh Interrogatory:

Please state fully in what profession or business were you employed during the months of May and June, 1922, and for how long a period of time have you been so employed; and in giving the names of the Association, Board, Company or individual, please designate the where such Association, Board, Company or individual is located or resides, and in what business it is employed.

A. See answer to interrogatory Number One. For last ten years. Tampico, Mexico.

Eighth Interrogatory:

Please state fully what experience you have had in preparing or directing preparation of vessels to be taken in tow; and in what capacity were you so engaged.

A. See answer to the seventh interrogatory. Have towed about fifty barges from the United States to Mexico and have brought about ten tow boats to Mexico.

Ninth Interrogatory:

What relations have your services, if any been rendered in connection with insurance to be effected or

effected on vessels to be towed; or with insurance Companies, Boards, Associations, etc., in respect to vessels to be put in condition to be taken in tow. Please give period and character of such experience.

A. Have prepared all of my company's vessels for sea under inspection of surveyors.

79 Tenth Interrogatory:

If in answer to the foregoing interrogatory (10th) you say you have had such experience; then please state what you understand by the terms "vessel and towing arrangements."

A. My understanding of the term "vessel" is the physical condition of the vessel, and "towing arrangements" consist of the size of hawser to be used in towing the vessel and the manner in which the towing hawser is to be made fast to tow boat and tow, and also size of vessel being used as a tow boat.

Eleventh Interrogatory:

Are your services called for with respect to arrangements to be made for towing vessels at sea or elsewhere? If yes, then state about how often you have served in such capacity; and whether or not when the vessel and towing arrangements are subject to your approval, whether or not it is necessary that the towage contract must be submitted to you with respect to anything therein contained.

A. Yes, but only for own vessels. Have served about fifty or sixty times but only for own craft. Contract is invariably submitted to office in Houston, Texas, and is never demanded by this office.

Twelfth Interrogatory:

If you are familiar with the terms and conditions usually entered into in contracts for towage services

between Gulf Ports, then please state during what period of time such knowledge extends, and between what ports and at what ports.

A. Ten years between Galveston, Texas, and Tampico, Mexico.

80 Thirteenth Interrogatory:

If you have personal knowledge of the usual terms and conditions of both verbal and written agreements for towing watercraft, in and between, Gulf Ports then state whether or not it is usual to agree to the following terms, to-wit:

(1) The towing vessel will furnish hawser. All other risk and expense to be borne by the vessel towed.

(2) The towing vessel is not responsible in any way for loss or damages to the vessel towed.

If you answer that it is usual in both verbal and written agreements to make such stipulations as above mentioned (1 and 2), then please state what is the usual, general acceptance, by owners of vessel towing and being towed, of the said agreements (1 and 2)—what it is they understand thereby.

A. It is usual to agree to terms mentioned. It is understood that all responsibility for loss of vessel is borne by the owners of the vessel being towed and that the towing vessel assumes no risk or responsibility. The above has been the custom with firms towing vessels.

Fourteenth Interrogatory:

Did you issue or execute, or were you furnished with a certificate, or certificates of seaworthiness, and/or

any other certificates or advices approving the said vessel "Wash Gray," and towing arrangements? If yea, then please attach hereto such certificate and/or certificates, or copies thereof, and have them marked for identification herewith.

A. Yes. (Attached.)

81 Fifteenth Interrogatory:

Please attach hereto copies of any telegrams, letters or other document, issued or executed by you bearing upon the approval of said tug "Wash Gray" and towing arrangements for the aforesaid voyage.

A. Documents attached.

Sixteenth Interrogatory:

State every other fact or thing within your personal knowledge bearing upon the fitness of said tug "Wash Gray" and towing arrangements for the aforesaid voyage as fully as if in detail questioned in relation thereto.

A. I was so convinced of the seaworthiness of vessel that I was going to take trip to the United States on her, being only prevented at the last moment by the Public Health Officer on account of a fever which I had.

Cross Interrogatories.

First Cross-Interrogatory:

Please state at whose request you examined the Tug Wash Gray, the nature of your examination, and who was present when you examined her.

A. I authorized the examination, which was made in the presence of both surveyors. To see that the vessel was seaworthy and to make her seaworthy. Both surveyors were present at examination

Second Cross-Interrogatory:

Please state whether you had any knowledge of the terms, or of the existence of the contract for the towing of the Tug "Wash Gray" from Tampico to Texas.

A. Was aware that there was a contract but was not familiar with the terms.

82 Third Cross-Interrogatory:

Please state whether any towing contract was ever mentioned to you and if so, with whom you had such conversation and the nature of the same.

A. My knowledge of the contract was confined to a letter I received from my Houston office that arrangements had been made with the Freeport Sulphur Company to tow tug.

Fourth Cross-Interrogatory:

Please state whether the vessel was examined by you on dry dock or out of the water.

A. No.

Fifth Cross-Interrogatory:

If you have answered that you were employed to make an examination of the Tug "Wash Gray," please state by whom you were employed and from whom you received your compensation.

A. Same answer as to Number One.

And further this deponent saith not.

(Sgd.) JESSE C. BARBOUR.

83 (Titles Omitted.)

Questions and answers in deposition of FRED FRANZ, witness for libelant, taken under direct and cross-interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. Fred Franz; Tampico, Mexico; Sanitary Inspector.

Second Interrogatory:

Were you, prior and down to the sixth day of June, 1922, acquainted with the physical condition of the steam tug "Wash Gray," her tackle, apparel and equipmnet? If yea, then please state what you know about her and about her tackle, apparel and equipment, especially during said period of time; and state what your experience has been which enables you to so testify.

A. No.

Third Interrogatory:

State whether or not you saw anything done on board of the said "Wash Gray" to better fit her for the voyage she undertook from the city of Tampico, in the Republic of Mexico, in tow of the Steamship Freeport Sulphur No. 1, bound thence to a Gulf Port in the United States, commencing said voyage on or about the sixth day of June, 1922.

A. No.

84 Fourth Interrogatory:

If you answer yes, to the preceeding question, then please state what, to your personal knowledge, was done on board of said vessel to better fit her

for said voyage; under whose direction it was done; what extra equipment, if any was installed on board of said tug and for what purpose.

A. See answer to the third interrogatory.

Fifth Interrogatory:

Do you know what quantity of boiler water was carried on board said tug as she started on said voyage? If yea, please state what quantity and where stowed.

A. No.

Sixth Interrogatory:

Did you see the said tug commence said voyage? If yes, please state what was her condition then, as observed by you, especially concerning her fitness for the said voyage on which she started.

A. No.

Seventh Interrogatory:

Please state fully in what profession or business were you employed during the months of May and June, 1922, and for how long a period of time have you been so employed; and in giving the names of the Association, Board, Company or individual, please designate the where such Association, Board, Company or individual is located or resides, and in what business it is employed.

A. Sanitary Inspector, United States Public Health Service.

Eighth Interrogatory:

Please state fully what experience you have had in preparing or directing preparation of vessels to be taken in tow; and in what capacity were you so engaged.

85

A. I only fumigated the vessel prior to its departure.

Ninth Interrogatory:

What relations have your services, if any been rendered in connection with insurance to be effected or effected on vessels to be towed; or with insurance companies, Boards, Associations, etc., in respect to vessels to be put in condition to be taken in tow. Please give period and character of such experience.

A. No relations.

Tenth Interrogatory:

If in answer to the foregoing interrogatory (19th) you say you have had such experience; then please state what you understand by the terms "vessel and towing arrangements."

A. See answer to the ninth interrogatory.

Eleventh Interrogatory:

Are your services called for with respect to arrangements to be made for towing vessels at sea or elsewhere? If yea, then state about how often you have served in such capacity; and whether or not when the vessel and towing arrangements are subject to your approval, whether or not it is necessary that the towage contract must be submitted to you with respect to anything therein contained?

A. No.

Twelfth Interrogatory:

If you are familiar with the terms and conditions usually entered into in contracts for towage services between Gulf Ports, then please state during what period of time such knowledge extends, and between what ports and at what ports.

86 A. Not familiar.

Thirteenth Interrogatory:

If you have personal knowledge of the usual terms and conditions of both verbal and written agreements for towing watercraft, in, and between Gulf Ports, then state whether or not it is usual to agree to the following terms, to-wit:

(1) The towing vessel will furnish hawser. All other risk and expense to be borne by the vessel towed.

(2) The towing vessel is not responsible in any way for loss or damages to the vessel towed.

If you answer that it is usual in both verbal and written agreements to make such stipulation as above mentioned (1 and 2), then please state what is the usual, general acceptance, by owners of vessel towing and being towed, of the said agreements (1 and 2)—what it is they understand thereby.

A. No knowledge.

Fourteenth Interrogatory:

Did you issue or execute, or were you furnished with a certificate, or certificates of seaworthiness, and/or any other certificates or advices approving the said vessel "Wash Gray," and towing arrangements? If yea, then please attach hereto such certificate and/or certificates, or copies thereof, and have them marked for identification herewith.

A. No.

Fifteenth Interrogatory:

Please attach hereto copies of any telegrams, letters or other documents, issued or executed by you
87 bearing upon the approval of said tug "Wash Gray" and towing arrangements for the aforesaid voyage.

A. Nothing to attach.

Sixteenth Interrogatory:

State every other fact or thing within your personal knowledge bearing upon the fitness of said tug "Wash Gray" and towing arrangements for the aforesaid voyage as fully as if in detail questioned in relation thereto.

A. No connection with towing arrangements.

Cross Interrogatories.

First Cross-Interrogatory:

Please state at whose request you examined the Tug "Wash Gray," the nature of your examination, and who was present when you examined her.

A. I examined the Wash Gray as Sanitary Inspector. The nature of my examination was to see if the vessel was fit for fumigation. The man in charge of the barge was present at the examination.

Second Cross-Interrogatory:

Please state whether you had any knowledge of the terms, or of the existence of the contract for the towing of the Tug "Wash Gray" from Tampico to Texas.

A. No one's.

Third Cross-Interrogatory:

Please state whether any towing contract was ever mentioned to you and if so, with whom you had such conversation and the nature of the same.

A. None.

88 Fourth Cross-Interrogatory:

Please state whether the vessel was examined by you on dry dock or out of the water.

A. No.

Fifth Cross-Interrogatory:

If you have answered that you were employed to make an examination of the Tug "Wash Gray," please state by whom you were employed and from whom you received your compensation.

A. United States Public Health Service.

And further this deponent saith not.

(Signed) FRED FRANZ.

89 (Titles Omitted.)

Questions and answers in deposition of MAX WINFIELD, witness for libelant, taken under direct and cross-interrogatories, propounded to and answered by him in the above entitled and numbered causes; to-wit:

First Interrogatory:

Give your name; age; place of residence; and occupation.

A. Max Winfield; 28 years; Tampico, Mexico; store man.

Second Interrogatory:

Were you, prior and down to the sixth day of June, 1922, acquainted with the physical condition of the steam tug "Wash Gray," her tackle, apparel and equipment? If yes, then please state what you know about her and about her tackle, apparel and equipment, especially during said period of time; and state what your experience has been which enables you to so testify.

A. Yes, condition of the tackle was good. For last three years have had experience in this kind of work.

Third Interrogatory:

State whether or not you saw anything done on board of the said "Wash Gray," to better fit her for the voyage she undertook from the city of Tampico, in the Republic of Mexico, in tow of the Steamship Freeport Sulphur No. 1, bound thence to a Gulf Port in the United States, commencing said voyage on or about the sixth day of June, 1922.

A. We first caulked the deck in places and
90 then put asphalt in the seams.

Fourth Interrogatory:

If you answer yes, to the preceeding question, then please state what, to your personal knowledge, was done on board of said vessel to better fit her for said voyage; under whose direction it was done; what extra equipment, if any was installed on board of said tug and for what purpose.

A. See answer to the preceeding interrogatory.

Fifth Interrogatory:

Do you know what quantity of boiler water was carried on board said tug as she started on said voyage? If yes, please state what quantity and where stowed.

A. Yes. Fresh water in the tank for drinking. Fresh water stored in the tank.

Sixth Interrogatory:

Did you see the said tug commence said voyage? If yes, please state what was her condition then, as observed by you, especially concerning her fitness for the said voyage on which she started.

A. Yes. Good condition.

Seventh Interrogatory:

Please state fully in what profession or business were you employed during the month of May and June, 1922,

and for how long a period of time have you been so employed; and in giving the names of the Association, Board, Company or individual, please designate the where such Association, Board, Company or individual is located or resides, and in what business it is employed.

A. Storeman under Jess Barbour, Superintendent and resident manager of Compania de Navega-
91 cion Interior, S. A. Three years; oil towers.

Eighth Interrogatory:

Please state fully what experience you have had in preparing or directing preparation of vessel to be taken in tow; and in what capacity were you so engaged.

A. See answer to the preceeding interrogatory.

Ninth Interrogatory:

What relations have your services, if any been rendered in connection with insurance to be effected or effected on vessels to be towed; or with insurance Companies, Board, Associations, etc., in respect to vessels to be put in condition to be taken in tow. Please give period and character of such experience.

A. None.

Tenth Interrogatory:

If in answer to the foregoing interrogatory (10th) you say you have had such experience; then please state what you understand by the terms "vessel and towing arrangements."

A. Nothing.

Eleventh Interrogatory:

Are your services called for with respect to arrangements to be made for towing vessels at sea or else-

where? If yes, then state about how often you have served in such capacity; and whether or not when the vessel and towing arrangements are subject to your approval, whether or not it is necessary that the towage contract must be submitted to you with respect to anything therein contained?

A. No.

92 Twelfth Interrogatory:

If you are familiar with the terms and conditions usually entered into in contracts for towage services between Gulf Ports, then please state during what period of time such knowledge extends, and between what ports and at what ports.

A. No knowledge.

Thirteenth Interrogatory:

If you have personal knowledge of the usual terms and conditions of both verbal and written agreements for towing water-craft, in, and between, Gulf Ports, then state whether or not it is usual to agree to the following terms, to-wit:

(1) The towing vessel will furnish hawser. All other risk and expense to be borne by the vessel towed.

(2) The towing vessel is not responsible in any way for loss or damages to the vessel towed.

If you answer that it is usual in both verbal and written agreements to make such stipulations as above mentioned (1 and 2), then please state what is the usual general acceptance, by owners of vessels towing and being towed, of the said agreements (1 and 2)—what it is they understand thereby.

A. No knowledge.

Fourteenth Interrogatory:

Did you issue or execute, or were you furnished with a certificate, or certificates of seaworthiness, and/or any other certificates or advices approving the said vessel "Wash Gray," and towing arrangements? If yes, then please attach hereto such certificate and/or certificates, or copies thereof, and have them marked for identification herewith.

93 A. No.

Fifteenth Interrogatory:

Please attach hereto copies of any telegrams, letters or other documents, issued or executed by you bearing upon the approval of said tug "Wash Gray" and towing arrangements for the aforesaid voyage.

A. Nothing to attach.

Sixteenth Interrogatory:

State every other fact or thing within your personal knowledge bearing upon the fitness of said "Wash Gray" and towing arrangements for the aforesaid voyage as fully as if in detail questioned in relation thereto.

A. Nothing further to add.

Cross Interrogatories.

First Cross-Interrogatory:

Please state at whose request you examined the Tug "Wash Gray," the nature of your examination, and who was present when you examined her.

A. At Mr. Dyer's request. To see that the vessel was ready for fumigation. Mr. Barbour was present and employees of the company.

Second Cross-Interrogatory:

Please state whether you had any knowledge of the terms, or of the existence of the contract for the towing of the Tug "Wash Gray" from Tampico to Texas.

A. No knowledge.

Third Cross-Interrogatory:

Please state whether any towing contract was ever mentioned to you and if so, with whom you had such conversation and the nature of the same.

94 A. No mention made.

Fourth Cross-Interrogatory:

Please state whether the vessel was examined by you on dry dock or out of the water.

A. No.

Fifth Cross-Interrogatory:

If you have answered that you were employed to make an examination of the Tug "Wash Gray," please state by whom you were employed and from whom you received your compensation.

A. At Mr. Dyer's request and paid by Mr. Dyer.

And further this deponent saith not.

(Sgd.) MAX WINFIELD.

MAX WINFIELD.

95 DEPOSITIONS OF CHARLES E. CLARKE, J. C. GRANT, C. A. BARBOUR AND EXHIBITS ATTACHED, TAKEN ON BEHALF OF LIBELANT, BEFORE ETHEL F. HILTON, NOTARY PUBLIC, IN AND FOR GALVESTON COUNTY, TEXAS, IN THE CITY OF GALVESTON, THE ABOVE WITNESSES BEING FIRST DULY SWORN.

Filed Jun. 2, 1926.

In the United States District Court, for the Eastern District of Louisiana, New Orleans Division.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,205.
Fireman's Fund Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,215.
Phoenix Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,206.
Globe & Rutgers Fire Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17, 214.
Franklin Fire Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,213.
Springfield Fire & Marine Insurance Co.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,210.
Aetna Insurance Company.

The Compania de Navegacion, Interior, S. A.,
96 vs. No. 17,211.
Western Assurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,212.
London & Liverpool & Globe Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,209.
National Liberty Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,208.
Hartford Fire Insurance Company.

The Compania de Navegacion, Interior, S. A.,
vs. No. 17,207.
Northwestern Fire & Marine Insurance Company.

Appearances:

On behalf of libelant Messrs. John D. & M. A. Grace (By John D. Grace, Esq.)

On behalf of respondents Messrs. Dart, Kernan & Dart, (By Henry P. Dart, Jr., Esq.) and Messrs. Andrews, Streetman Logue & Mobeley (By Robert H. Kelley, Esq.)

It is agreed by and between the parties hereto and their respective counsel that the hearings shall be had before Ethel F. Hilton, a notary public in and for Galves-

ton County, Texas, in the city of Galxeston, who shall take the testimony in shorthand, transcribe it and certify to the taking of the testimony and its transcription; and shall furnish the original, and one carbon copy for respondents, the original and said copy the be taxed as costs; signing, sealing and certification being waived.

97 CHARLES E. CLARKE, being first duly sworn to tell the whole truth, testified on behalf of libelant as follows:

On Direct Examination

By Mr. Grace.

Q. Mr. Clarke, where do you reside?

A. Galveston, Texas.

Q. How long have you resided here?

A. All my life.

Q. What business are you engaged in?

A. Government contracting and towing.

Q. How long have you been engaged in that business?

A. Well, I have been one of the firm, connected with the firm, the last twenty-eight years.

Q. What particular line of business have you engaged in? Going a little further into details, in what places, the character of it, etc.

A. We have been towing and wrecking on the Gulf coast.

Q. During all that period of time?

A. During all that period of time, off and on.

Q. That would be not only between Gulf ports in the United States—

A. And Mexican.

Q. Mexican Cuban and Porta Rican?

A. Yes, Porto Rican and Cuban.

Q. Is there any other towing company located at any place in Texas south of Galveston?

A. Except Freeport Sulphur Company.

Q. Now in this general towing business, would that relate to towing of steamships, tugs, barges, and other water craft of every description?

98

A. Yes, sir—dredge boats.

Q. Where a contract is entered into for the towing of a vessel—say from Galveston down to a Mexican Gulf port, or from a Mexican port up to an American Gulf port, what are the terms and conditions with respect to the question of liability for damage to tow?

A. Be at owner's risk.

Q. At which owner's risk?

A. Well the owner of the tow—or have it insured—or the owner of the boat that is being towed.

Q. Of course whether he insured it or no that would be entirely up to the owner of the boat?

A. That would be up to the tow.

Q. As a matter of fact, does your corporation, or company—

A. Firm.

Q. —Firm, enter into contracts for the towing of tugs between Gulf ports—whether between foreign and American Gulf ports or American and foreign ports, where your firm assumes any risk with regard to the safety of the tow?

A. None whatever.

Q. And is that course of procedure where the tow must stand its own responsibility one which obtains both with respect to contracts made orally as well as written ones?

A. Well, we stand no responsibility at all.

Q. No matter whether the contract is verbal
99 or—

A. That is the rule we have had.

Q. And that rule of yours and course of procedure has been followed by your firm for—how long a period of time?

A. As long as I have been connected with the firm.

Q. About twenty-eight years?

A. Yes, sir.

Q. What is the name of the firm?

A. Charles Clarke & Co.

Q. How does the amount of business done by your firm here in Galveston and at and from and to Galveston compare with business done by the others at this port?

A. Well, about equal to some of the other larger ones.

Q. Have you had occasion to engage tugs to aid and assist where you might be crowded or have rush work on hand, to aid you and assist you in towing operations?

A. No, sir.

Q. Always have vessels enough of your own?

A. Yes, always had enough.

Q. Have you undertaken towage services for other concerns engaged in that business to aid and assist them?

A. I have on some occasions.

Q. What have you to say with respect to the course of procedure with other towboat companies with respect to the kind of liability for damage to tow? is it different or the same—

Mr. Dart:

We object to this question and all other questions along the same line on the ground that the evidence here sought to be elicited is irrelevant, incompetent and immaterial, not the best evidence, is res inter alias actio; and move to strike out any evidence given in answer to the question. It is agreed that the same objection and same motion shall be considered as having been made to all similar questions along the same line without the necessity of renewing the same.

Q. Answer the question, please?

A. I would not be able to answer what the other towing companies' rule is, more than that any tow that my boat was being used in would not be responsible for any part of the tow.

Q. And you say that has been your custom for some twenty-eight years?

A. That has been mine, yes.

Q. How many vessels does your firm operate?

A. We are only operating two now; we have been operating as high as four or five.

Q. Of course business right now is slack?

A. Pretty quiet.

On Cross-Examination

By Mr. Dart.

Q. What sort of vessels do you operate?

A. We have been operating from 600 HP down. 600 HP is usually what they call ocean-going tow boats.

Q. They are tug boats?

A. Yes, sir.

Q. Not cargo carriers?

A. Not cargo carriers.

Q. I presume as tug boats operators you are engaged in towing vessels, barges, and other craft?

A. Yes, sir.

Q. Tow them on the end of a hawser or alongside?

A. At different times inside, or probably alongside, or outside at the end.

Q. Your firm is located at Galveston?

A. Yes, sir.

Q. Do you do outside as well as inside work?

A. At times.

Q. The bulk of your work is harbor work or inside?

A. Not altogether—mostly coastwise on short trips now.

Q. But I mean the bulk of it is not towage across the Gulf?

A. Foreign ports? such as Mexico?

Q. Foreign ports—

A. No, sir.

Q. What percentage of it would you say would be towage to foreign ports?

A. Well, at what time?

Q. During the last twelve months.

A. A very small percentage; in fact on foreign ports none at all in the last twelve months.

Q. You haven't done any foreign business during the last twelve months?

102 A. No.

Q. Saying the last two years, how much towage to foreign ports have you done?

A. Well, we haven't done any in the last couple of years.

Q. How about the last three years?

A. I don't know unless I go back into the records.

Q. Well, as I understand it, the percentage of foreign business you do is very small?

A. Very small.

Q. The bulk of your work being either in the harbor, Houston ship channel or along the coast?

A. Yes.

Q. Now I understood you to testify that it is the custom of your firm not to accept any towage business unless the tow assumes responsibility for any damage or loss that might occur in the service?

A. That is our rule.

Q. That is your rule, and that rule is written into every contract of towage you make? is that right?

A. Yes, sir.

Q. And you have the rule whether you make a written contract or whether you make a verbal contract?

A. Yes.

Q. You don't pretend to say though that in the absence of any contract at all that would be the law, do you?

A. No, sir.

103 Mr. Grace:

We object on the ground that the witness is called upon to pass on a legal question which is a matter for the Court to determine.

Q. You know, Mr. Clarke, do you not, that, as result of your experience in the towage business if you didn't have such a contract you would of course be responsible for any loss caused by your own fault?

Mr. Grace:

That is a question of responsibility for the Court to decide and pass upon and not the witness.

A. I don't know.

Q. You don't know whether you would be responsible for your own negligence or fault if you didn't have a contract protecting you?

A. I don't know about the negligence part. We use all care to land the tow safely.

Q. If you were not responsible what would be the necessity of making the contract to relieve you of responsibility?

Mr. Grace:

All this line of examination is objected to on the ground it involves questions purely of law.

A. Well, we take the tow on that basis, that the boat being towed is responsible.

Q. Well, you are testifying as to rules of your firm, as to conditions you put in your contract: Now the question I ask is, If you were not responsible without a contract being made, why insert such a clause
104 into your contract?

A. Well, we have always made that kind of contract, that we are not responsible for the tow.

Q. But if you accepted the tow and the tow was lost through the gross fault of your own people, your employes, in not taking ordinary precautions to protect it, wouldn't you be responsible in such case?

A. I don't know whether I would or not.

Q. That is why you put the clause in the contract which will protect you? is that correct?

A. That we are not responsible for the tow.

Q. You mean you get a waiver of responsibility no matter how the loss is caused?

A. I don't know what the law would do.

Q. I am not talking about the law, I am talking about your contract. I am trying to find out exactly what conditions you put in your contract. You state you will not take any business or make a contract unless the owner of the tow agrees you will not be responsible?

A. Yes.

Q. I ask you, responsible for what? responsible for loss caused by your own fault or caused by Act of God?

A. For safety of the tow.

Q. You mean under all conditions, no matter how the loss is caused?

A. Yes.

Q. In other words, you do not accept any responsibility no matter how the loss is caused, whether by Act of God or by your own carelessness?

A. Yes, sir.

105 Q. Is that your rule?

A. Yes, sir.

Q. Well, now, suppose a collision occurred between the vessel you were towing and another steamer out in the bay or in the Gulf, and the steamer that was injured sued you: Under your rule or under your contract would you be responsible for that damage?

Mr. Grace:

Objected to on the ground it is purely a question of law and not a matter for the witness to pass upon but for the Court to determine.

Mr. Dart:

I am not asking the witness a question of law, I am asking what the conditions of his contract are.

Mr. Grace:

I submit further that the question is wholly irrelevant, incompetent and inadmissible because no such question as the one propounded is involved in this case in any way.

Q. Can you answer the question?

A. I don't think so.

Q. You don't think so. Don't you know, Mr. Clarke?

Mr. Grace:

Objected to further because there is a difference of opinion between even Courts themselves on questions of that kind.

Q. Can you answer the question?

A. No, we would not be responsible.

Q. You would not be responsible?

A. No, sir.

106 Q. You would not be responsible for any damage either to the tow or to third persons? is that correct?

Mr. Grace:

Same objection.

A. No.

Q. And is that provided in all your contracts?

A. Yes, sir.

Q. Have you a standard form contract that you use?

A. Why no standard form.

Q. You have no printed clause put on your stationery for making such contracts?

A. No, we have a memorandum contract that the boat being towed will stand loss or damage while being towed by our boat.

Q. Well do you specifically use the words that you will not be responsible for damage to other vessels in addition to the tow?

A. To the boat being towed by our boat, yes, sir.

Q. I mean, do you put that in your contract that you will not be responsible for damage to third persons, that is other vessels, in addition to the boat you are towing?

A. Well, we don't know anything about the third person; the only thing we know about is the boat we are towing.

Q. Please tell us substantially how does that clause read? just dictate to the stenographer the words you use in your contract?

A. Well, we generally make a price per tow, and that while that boat is being towed we are not responsible for the loss or damage of that boat while being
107 handled by our tow boat.

Q. Now what words do you use with reference to other vessels outside the tow?

A. We don't use any words.

Q. You don't mention that at all, but you say that if you did have a collision with a steamer not being towed which was damaged by the boat you were towing, under your contract you would not be responsible to the steamer so damaged?

Mr. Grace:

Objected to as being purely a question of law, not one for the witness to answer, and, further, that there is no matter of collision involved in this case, no third vessel concerned, and the questions are not only improper because involving an interpretation of the law, but likewise inadmissible because involving a subject not in any way, directly or indirectly, concerned in this case. It is agreed that the same objection shall be considered as having been made to all similar questions along the same line without the necessity of renewing the same.

Q. Now, can you answer that question?

A. Why on that third part we don't—as I mentioned once before, we don't mention any third boat or person in there.

Q. But what you intended to imply by your contract was that you would not be responsible even for damage to other vessels outside the tow?

A. Yes, sir.

108 Q. That is what you meant when you used those words in the contract?

A. Yes, sir.

Q. Do you say anything in your contract to the effect that your tug boat shall be considered as the agent or servant of the boat, of the vessel you are towing?

A. No.

Q. You don't mention that?

A. No.

Q. Is it your understanding that by your contract you would be the servant or agent of your tow?

A. That I would—

Q. That your vessel would?

A. I don't know.

Q. At any rate there is nothing in your contract on that point?

A. No.

Q. Now suppose the owner of a barge or a vessel refused to sign such a contract or make such an agreement, what would you do?

A. Turn the tow down, wouldn't take it.

Q. Wouldn't take it under any circumstances?

A. No.

Q. Suppose the owner of the tow took out insurance and paid the premium, wouldn't you be willing to assume responsibility for all other losses—

A. Well, we would take a tow being insured.

Q. That is what I mean, where the vessel

109 was insured.

A. When the vessel was insured, owner's risk.

Q. When you were testifying in answer to Mr. Grace on direct examination you said you accepted vessels on condition at owner's risk or if they have it insured—I think I got the words correctely. You mean there tha you either accept the vessel at the owner's risk solely or you accept it without exacting those conditions if the owner has his vessel insured?

A. If the owner has it insured.

Q. Then you are willing to take it without exacting the requirement that releases you from responsibility? is that right?

A. Well we don't—either owner's risk or have it insured, trip insurance.

Q. When the owner has his boat insured against that particular trip do you then require him to sign a waiver of responsibility?

A. He generally signs a contract.

Q. I understand, but you mentioned the subject of insurance. Where the owner of the tow has his vessel insured, I say in that case would you still require him to sign a waiver of responsibility?

A. We generally have the owner of the boat to sign it and he is the one that is covered by incurance, [insurance] but he signs the contract.

Q. He signs the contract?

A. Yes, sir, releasing us from any damage or loss of the vessel.

110 And then he covers the vessel with insurance?

A. Yes, sir.

Q. Suppose the vessel is lost and the loss is caused by your own negligence or your fault? Suppose one of your men takes a rock and throws it through the bottom of the boat and sinks it, do you still consider you are protected by your contract?

A. I don't know whether I am or not.

Q. I say, do you consider according to the rules and regulations of your business?

A. Yes. I think I am.

Q. You still think you are protected?

A. Yes, sir.

On Re-Direct Examination

By Mr. Grace.

Q Whenever you are concerned in the interpretation of your legal rights as to what your rights are under a contract and what your repsonsibilities are as a matter of law under the contract, do you attempt to determine the legal question or go to your attorney for advice?

A. Generally go to my attorney.

111 J. C. GRANT, being first duly sworn to tell the whole truth testified on behalf of libelant as follows:

On Direct Examination

By Mr. Grace.

Q. Captain, where do you reside?

A. Galveston, Texas.

Q. How long have you resided here?

A. About eighteen years.

Q. What line of business are you in?

A. Marine surveying.

Q. Are you identified with any insurance company or salvage association or anything of that sort?

A. Well, I am connected with them in this way: I do the surveying for London Salvage Association, and most of the large insurance companies in America—

Johnson & Higgins, Wilcox Beck & Hughes, Chubb & Son, Frank B. Hall & Co., and the New York Board of Underwriters.

Q. And during what period of time have you been representing those different firms and insurance companies and associations?

A. In my own business for fifteen years, but before that I worked in connection with Mr. T. J. Anderson as his assistant for five years—twenty years altogether.

Q. You are still occupied in that business?

A. Yes, sir.

Q. In that line of business have you been frequently called upon to inspect vessels to be towed out on the Gulf?

A. Yes, sir.

112 Q. Both coastwise and foreignwise?

A. Both.

Q. Do you recollect as matter of fact having examined or surveyed for purposes of insurance the tug Wash Gray on a trip from Galveston to Tampico?

A. Yes, sir.

Q. When was that Captain?

A. About three years ago I think.

Q. What was the condition of the Wash Gray as you found her on that occasion?

A. She was in first-class shape then; she had just been rebuilt.

Q. So that at that time she was in fact a rebuilt vessel?

A. She was; everything was practically new about her in her hull,

Q. And with respect to her machinery and other equipment, what was its condition?

A. It had all been thoroughly overhauled and put in first-class order, and a lot of pumps and things were new if I remember.

Q. And those things that were not new were in first-class order and condition?

A. Yes, sir.

Q. Then on that occasion about three years ago when you examined the Wash Gray for the trip to Tampico she was practically in all respects a new vessel?

A. She was.

113 Q. What have you to say with reference to the construction of the vessel?

A. She was a good strongly constructed little boat.

Q. In your line of business Captain, where the underwriters require that the vessel and her towing arrangements be approved by you as the designated surveyor, or by any other designated surveyor, what is understood among the marine surveyors by those terms?

Mr. Dart:

We object to the evidence on the ground that it is irrelevant, incompetent and immaterial, not covered by any allegations of the pleadings, and move to strike out any evidence given in answer to this question or other questions along the same line. It is agreed that the same motion shall be considered as having been urged to all similar evidence.

Q. This question, Captain, is propounded particularly to your own personal understanding of those terms during all these years of your practice in the profession as well as what is generally understood by surveyors in that profession and line of work.

A. When I get instructions to examine a boat for towing on the coast or otherwise I make a thorough examination of the hull as far as possible under the conditions; then I recommend what has to be done, such as boarding doors up, fitting additional pumps, boarding windows up, putting extra bracings on the house if

114 necessary; make an examination of the towing bits to see that they are in order, and recommend the size of hawser that is to be used, and whether steam is to be kept up on the boat, and practically the number of men that is to be kept on board of her.

Q. Is that then what is understood by your profession as the "towing arrangements"?

A. That is what I have always carried out for the last fifteen or twenty years; and very often they ask me to approve the tug that will take the tow.

Q. That is, the vessel that is to do the actual towing?

A. Actual towing.

Q. Where the underwriters themselves approve that vessel then you have nothing to do with it?

A. Nothing at all.

Q. Then the examination you speak of with reference to the hull, machinery, etc., is to determine first if she is in seaworthy condition?

A. That is the first consideration.

Q. To make that voyage, and what other conditions and things, especially if she is an inside vessel, shall be done to enable her to make this outside trip?

A. Yes, sir.

Q. Was the Wash Gray what is known as an inside vessel?

A. Yes, sir.

Q. So that special towing arrangements nad to be made for that vessel to fit her for the Gulf

115 voyage?

A. Yes.

Q. Now, Captain, in your years of experience has there been frequently occasions where the owners of the vessel have submitted to you forms of contract for towage services on the Gulf?

A. Yes, sir.

Mr. Dart:

We object to that evidence on the ground heretofore urged and move to strike out any evidence the witness gives in answer there to.

Q. In all the different contracts for towage services that you have seen in the years of your experience, and in the business that has thrown you in contact with matters of that kind, what has been the terms and conditions with regard to liability for loss or damage to tows, as to who stands that?

A. The towing steamer takes no responsibility whatever, nor the tug boat, whichever it is.

Mr. Dart:

We renew our motion to strike the evidence out for the reasons heretofore urged.

Q. Is that universal with regard to towage service?

A. In all contracts that I have been asked to look over that was the wording of the contract.

Q. And where you have looked over the contracts, has that been for account of owners themselves?

A. Account of owners themselves, nothing to do with insurance company, solely looking over for the owners.

Q. As a surveyor the underwriters or insurance companies never call upon you to look at the con-
116 tract between the two parties?

A. No, sir—nothing at all to do with it.

Q. Have you in mind any particular cases where there have been tows of large properties involved from American ports to Mexican, Panaman or South American ports? and coastwise?

A. Yes, I have seen numbers of them taken and sent a number of big dredges up to New York.

Q. Within the last two, three, four years—just give us an instance of some of them?

A. I sent a large dredge to the Panama Canal last year; she was insured for nearly a million dollars. That towing contract was with the Texas Company, and they had no liability whatever for the tow—I saw the contract myself.

Q. The Texas Company refused to assume responsibility?

A. No responsibility whatever. We had to buy the hawser for the boat to use her.

Q. You were representing the owners of the dredge?

A. I was representing the insurance companies.

Q. And those contracts you speak of, were they submitted to you on behalf of the insurance people for their account?

A. Just private—by the owners, asked my advice about it.

Q. Then you are a consulting surveyor whose services may be secured by owners of vessels as well as by underwriters?

A. Yes, sir—I work for them both.

Q. So it was in your capacity as consulting surveyor that the owners submitted to you these con-
117 tracts?

A. Yes, that is the case.

Q. Then I presume in your many years' experience on the Gulf you have seen a great many of those contracts?

A. I have seen most of them of any consequence around here.

Q. What have you to say with reference to each and every one of those contracts on the question of liability?

A. Owners of the boat taking the tow take no liability for the safety of the tow whatever.

On Cross-Examination

By Mr. Dart.

Q. When was it you made this survey of the Wash Gray?

A. May I refer to my report?

Q. Yes.

A. (referring to report) November 29, 1920.

Mr. Dart:

May I see that report?

(Witness handed report to counsel for examination)

Mr. Grace:

This document you produce is a copy of the survey you made of the Wash Gray?

Witness:

Yes, sir.

Mr. Grace:

We offer the report in evidence in evidence in connection with the testimony of the witness, and ask that it be marked Libelant's Exhibit 3 for identification.

Mr. Dart:

We object to the document offered on the ground it is a self-serving declaration, and is irrelevant, incompetent and immaterial, and not the best evidence, and move to strike it from the record for the reasons
118 urged. It is agreed that the same objection may be considered as urged to all questions with reference to the same, and now having reserved all rights under the objections made we will continue the cross-examination of the witness.

Mr. Grace:

That is your own report?

Witness:

Yes, I made the survey.

Q. (cross-examination cont'd) Now Mr. Grant, you have refreshed your memory by referring to this certificate which you issued on November 29, 1920, showing the result of your examination of the tug Wash Gray?

A. Yes, sir.

Q. On November 29, 1920— that is correct?

A. That is correct.

Q. Please tell us whether the tug was lying afloat at the pier or was out of the water?

A. She was afloat.

Q. You never examined the vessel in dry dock I presume?

A. No, sir.

Q. How long did your examination take?

A. Took me about two hours.

Q. Did you examine the hull of the vessel?

A. As far as possible afloat I did.

Q. That is you examined it above the waterline and from the exterior?

A. Yes, sir.

Q. Of course you couldn't see beneath the
119 water on the outside?

A. No.

Q. Did you make the examination or through a deputy? Did you make the examination yourself?

A. I made it myself, sir.

Q. You state in your report that the tug has just been rebuilt, being reconstructed at Morgan City by the Intercoastal Shipbuilding Co.?

A. Yes.

Q. I suppose that was derived from information some body gave you?

A. I could see the new timbers in it.

Q. When was the boat originally constructed?

A. I don't know, sir.

Q. Where was it constructed?

A. I don't know.

Q. By whom was it constructed?

A. I don't know.

Q. By whom was she owned at the time you made this examination?

A. Compania de Navegacion, Interior.

Q. You mean Mr. Barbour's Company?

A. Yes, sir.

Q. And the object of this survey was to ascertain whether she was in fit condition to be towed from Galveston to Tampico behind the S. S. Topila?

A. Yes, sir.

Q. And you found on that date she was in fit condition?

120 A. After I made my recommendations of what was required and saw them carried out, —I put her in condition.

Q. Why had this vessel been rebuilt and reconstructed?

A. I don't know anything about her up to the time I saw her.

Q. How long previous to your examination had she been rebuilt?

A. She had just come off the way, just come from the builders.

Q. Just come off the ways?

A. She may have been in the water some, I couldn't say as to that, but she had never been run or anything of that sort.

Q. Did you make any trial trip on her?

A. No, sir.

Q. Merely looked at her at the wharf?

A. Saw steam up on her and ready to go. I saw steam up on her before she left Galveston.

Q. How long was the tug?

A. To the best of my knowledge between 80 and 90 feet.

Q. What was her beam?

A. About 14.

Q. And her depth?

A. About 7 or 8—somewhere along there. I forget now.

Q. And her tonnage?

A. About 150.

121 Q. How many engines did she have?

A. One.

Q. What was her steam pressure?

A. I don't remember now.

Q. What sort of fuel did she use?

A. Oil; but she had none on board then so I put coal on board her for the trip.

Q. For the trip to Tampico?

A. Yes, sir. When I say I put it on board, I recommended that it be put on board.

(Mr. Grace:

In other words, you required it to be put on board?

Witness:

I required it, yes.)

Q. How many towing bitts did she have?

A. At the forward end she had double towing bitts with a "T" piece on it.

Q. Please describe that more in detail?

A. Two towing bitts were connected together with a plank, forming a kind of table, under the bitts.

Q. You mean there there were two towing bits, one right alongside of the other?

A. There was a distance between the two.

Q. How far apart?

A. A foot apart—somewhere along there.

Q. Running from the deck of the vessel down to the bottom?

A. Fastened in; and then there was a table two or three feet from the deck; this table was
122 built around the two bitts.

Q. Over the top of the two bitts?

A. The bitts would be about 18 inches from the table.

Q. Forming a sort of collar around the bitt?

A. Same thing as a collar—table they call it.

Q. Those bitts were what dimension? Your report says 12x12—I suppose that is correct?

A. That is correct. I measured them when I made the survey.

Q. Each bitt 12x12—made of pine I suppose?

A. Pitch pine.

Q. How far forward were they?

A. I suppose about three feet from her bow.

Q. The towing hawser would be fastened above the table?

A. Underneath and above the table as well. The whole thing is passed around.

Q. What test did you make if any to see whether the vessel was leaking?

A. I visited her two or three times during the time she was getting ready and she made no water during that time.

Q. Did you take up the flooring to see whether she was leaking?

A. Yes, sir, in the engine room.

Q. Did you take the flooring up forward of the engine room?

A. No, sir, there was no need to do that because the tug boat was down at the stern and all
123 the water she would make would run aft.

Q. You didn't go down in her hold forward and examine her timbers?

A. Yes, sir; I went all over her wherever I could get in her and made a thorough examination.

Q. Wherever there was flooring you didn't pull the flooring up?

A. There is one board at the bottom of the floor lifts up, the bilge board, and you can lift that up and examine the timbers.

Q. Just above the keel?

A. Yes, sir.

Q. And that shows where the ribs join on to the keel?

A. Yes; that is a movable board.

Q. You went down in the hold with a light I presume and looked around?

A. Looked to see if she were leaking—lifted that board and looked to see if she were leaking.

Q. Did you examine the bitts?

A. Yes, sir; that was the most important thing, to see that those bitts were properly secured.

Q. And you did that?

A. Yes, sir.

Q. How about the pumps of the vessel? Did you make any examination of her pumps?

A. Yes.

Q. Did you try her pumps?

A. Tried the pumps before she left after I got steam on her.

124 How many pumps did she have?

A. One pump, two syphons on her bilges to the best of my recollection.

Q. And what was the size of her pump and the size of the syphons?

A. I forget the size of the pump but it would be the ordinary bilge pump—run about 4½x6—4½, somewhere around there; and the syphons were three-inch syphons.

Q. Did you make any examination of her propeller shaft?

A. No, sir.

Q. How could you tell whether everything was all right in that part of the vessel without examining it?

A. I didn't quite get that question.

Q. How could you tell whether or not the vessel was in good condition in the neighborhood of the propeller shaft if you didn't examine it?

A. The propeller shaft wasn't going to be used on the way down, and I wasn't very much interested whether it was in good condition.

Q. In other words she was to keep up steam for the purpose of pumping and not—

A. She was going to be towed, and I wanted steam on her to take care of the boat, for pumping purposes.

Q. How many men comprised her crew?

A. I think she had about five men on board.

Q. How many of those men were engine room men?

A. Three of them I think, to the best of
125 my knowledge and two deck hands.

Q. Why did you prescribe that all doors and windows in her house should be thoroughly boarded up?

A. Because she was an inside tug and if she got into any bad weather she would be liable to break the doors and windows in.

Q. You mean the water breaking over her would come through the doors and windows?

A. Yes.

Q. Why did you require steam to be kept up on the boiler during the passage?

A. For the safety of the tug, in case they got bad weather and started to leak—so they could use the pumps.

Q. In other words, you made the usual examination, did you not, such as you make of other vessels of similar character?

A. Yes, sir.

Q. That is part of your regular work, is it?

A. Yes, sir.

Q. And at the request of owners of vessels, and sometimes at the request of underwriters, you examine them to ascertain whether or not they are seaworthy?

A. Yes.

Q. About how many vessels a year do you examine?

A. Sometimes two a day, sometimes three—an average of one a day during the year I should say.

Q. Now at whose request did you make this examination?

A. At the request of the underwriters.

126 Q. What agent of the underwriters, do you remember?

A. Adams & Porter, Houston.

Q. This is the only time you ever examined this vessel?

A. Yes, sir.

Q. You never made a trip on her?

A. No, sir.

Q. Now it is possible, is it not, that when you make an examination even though you use due diligence, that you are sometimes mistaken in the result of your examination?

A. We are all liable to make mistakes.

Q. I understand—but it is possible?

A. Well, it is possible; but if you make an examination you know whether the timbers of the ship are good and sound—you can't get away from that.

Q. Of course I understand Captain that we all are likely to make mistakes, I make many myself—

A. Well, I make mistakes.

Q. What I want to bring out is, that even though you had done everything that is usually done by surveyors in making the examination you are very likely sometimes to be wrong due to matters of which you have no knowledge? That is correct isn't it?

A. Well, I can't say that. I can't agree with you there. If you make a thorough examination of that boat as I did, I consider she was in proper condition to proceed to Tampico at the time I examined her.

Q. To take a concrete example: A few years ago you made an examination of an oil barge that
127 was to be towed by Chas. Clarke & Co. from Lynchburg down the Houston Ship Channel to Port Arthur?

A. Yes.

Q. And that boat had just been rebuilt, too, had it not?

A. Yes.

Q. Had been rebuilt at either Port Arthur or Orange?

A. No, Galveston.

Q. And that was an ocean-going oil barge, wasn't it?

A. Yes, sir.

Q. Used for carrying oil in bulk across the Gulf?

A. Yes, sir.

Q. You made an examination of that vessel at the request of Chas. Clarke & Co.?

A. I believe so.

Q. And you gave to them a surveyor's certificate that in your best judgment she was seaworthy?

A. I didn't go inside of her, sir.

Q. I understand, but you made an examination of the barge lying at the dock?

A. Lying at the dock.

Q. And you certified that in your opinion she was seaworthy?

A. Yes.

Q. After the vessel started on her trip from Lynchburg and in 30 minutes from her wharf she broke under the weight of her own cargo and sank, didn't she?

A. No, she didn't break; she started to leak.

128 Q. I mean she broke down and became waterlogged?

A. Became waterlogged.

Q. Became waterlogged and was stranded and afterwards abandoned, wasn't she?

A. After I got inside her I condemned her.

Q. You made another examination afterwards?

A. When I made an internal examination of her I condemned her.

Q. Which showed that not only you but other surveyors who examined her were mistaken in your original investigation?

A. Well, I think the other surveyors had an internal examination of her because they did the repairs on her.

Q. They were mistaken? You recollect who they were?

A. T. J. Anderson examined her, I believe.

Q. And who else?

A. T. J. Collins, New Orleans.

Q. And due to the vessel's unsound condition she opened up, spilled her cargo out, water came in from the Gulf, and she became waterlogged? Is that correct?

A. Not on her unsound condition; her timbers were good; it was due to her construction.

Q. To her method of construction? She was improperly constructed which of course made her unseaworthy?

A. Yes.

Q. Now, as an illustration of the method of doing business in such matters, in that case did you call for and examine the towage contract between Chas.
129 Clarke & Co. and the owner of the barge?

A. Not at that time. I was called down about half hour before the barge left, she was about ready to leave port when I was called in.

Q. You were called in by Chas. Clarke & Co., were you not?

A. To the best of my knowledge I was.

Q. Did you look at the contract, the towage contract?

A. No, sir.

Q. Did you call for it?

A. No, sir; it is not my business.

Q. It is not part of the regular duties of a surveyor?

A. No, sir.

Q. You have no concern I presume with the towing arrangements between the tow boat and the owner of the vessel being towed?

A. No, sir; that is not a surveyor's business.

Q. Although you are sometimes called upon to approve the vessel that does the towing?

A. That is the general rule, call upon the surveyor to approve the towing steamer.

Q. In testifying as to the general rule among towboat people in requiring owners of the tow to waive responsibility, you are confining your testimony to your own knowledge I presume?

A. To my own knowledge, and having seen and been consulted about their contracts.

Q. And having seen various towage con-
130 tracts?

A. Yes, sir.

Q. And your knowledge is confined to your experience in and about the harbor of Galveston, is it not?

A. Yes, sir.

Q. You would not presume to say that the same regulation or rule existed among towboat people in New Orleans, would you?

A. Yes, sir; I have sent lots of boats away from New Orleans as well.

Q. Did you ever see a contract of towage between the owner of a towboat and the tow for services on the Mississippi River and the harbor of New Orleans?

A. No, sir.

Q. Did you ever see a contract of towage for services from the port of New Orleans to the port of Tampico?

A. Yes, sir.

Q. What was the contract and who were the parties?

A. Sent a stern-wheel steamer from there, and have sent a big dredge from there. She was a dredge I sent down to British Columbia, through the Panama Canal at all events, billed to some big firm in New York—I can't remember the names.

Q. Did you see the contract of towage?

A. Yes, sir; in fact I helped draw it up with the owner of the dredge.

Q. Who were the towboat owners?

A. Texas Company.

Q. Is that the one you just referred to on
131 your direct examination?

A. Yes, sir; and I fitted up a stern-wheel steamer for—I forget the name of the oil company.

Q. You are prepared to say that every towboat company in the harbor of New Orleans makes that requirement?

A. No, sir; but all I have had dealings with.

Q. That is what I mean, those that you have come in contact with?

A. Yes, sir.

Q. But the bulk of your work is confined to Galveston?

A. Galveston—Port Arthur—Galveston District, which is Galveston, Port Arthur, Beaumont, Orange and Houston.

Q. Exactly what is this requirement that the tugboat people make of the owner of the tow?

A. I don't know the exact wording of it as put in the contract, I can't repeat that, but it is simply understood that they take no responsibility whatever.

Q. No matter how caused?

A. No.

Q. Whether by act of God or by their own fault?

A. No.

Q. Is there anything said in those contracts about accidents or damages by other vessels outside the towing vessel or tow?

A. Sometimes there is and sometimes there is not.

Q. What is the regulation? What is the rule? You have stated one rule—

A. There is no proper rule at all as far as that goes, each tug boat practically has its own

132 wording of a contract, but that one I know for a fact, about the one that they take no responsibility of the thing they have in tow.

Q. In other words, some towboat companies add other conditions, such as not being responsible for damage to any other vessel?

A. Yes, sir; that all depends on the owners of the tug boat.

Q. I suppose still others add further conditions, such as making themselves employes or servants of the boat they are towing?

A. They tried that on one or two and it didn't work.

Q. Why?

A. Because the tow boat had to take out liability insurance for the men on the towboat and the barge.

Q. Had to take out workmen's insurance?

A. Yes, compensation.

Q. In the case of the first condition you mention, the waiver of responsibility for loss no matter how caused, would that condition be applied even though the tow were insured?

A. All the tows I have had to do with had to be insured, otherwise I wouldn't have anything to do with them.

Q. You have never seen the tug Wash Gray I presume since you examined her in 1920?

A. Yes, sir; I saw her in Tampico. I didn't go on board, I passed her when I was in the river.

Q. When was that?

133 A. About a year after I sent her down there.

Q. You sent her in November, 1920, and this would probably have been November, 1921?

A. Somewhere along there.

Q. She was being used around the harbor of Tampico at that time?

A. Yes, sir.

Q. Engaged in towing?

A. Yes, sir.

Q. You know nothing of your own knowledge about this case I presume?

A. No, sir, all hearsay.

On Re-Direct Examination.

By Mr. Grace:

Q. Captain, will you kindly look over your specifications and certificate here on which Mr. Dart was examining you concerning the details of the vessel, and state what you find therein respecting the engines with which the vessel was equipped?

A. Yes, sir, I see I have made a mistake—she had two engines.

Q. That statement set out in the specifications is true and correct?

A. Yes, sir.

Q. Made at the time of your examination?

A. Yes, sir.

Q. Your examination by Mr. Dart was with respect to your best recollection with respect to the
134 inspection you made over two years ago?

A. Yes, sir.

Q. And you examine, I understood you to say, on an average of a vessel at least a day?

A. Yes, sir. I was not certain whether she had twins or not.

Q. Now having seen this memorandum—

A. I can remember her now—I can remember her better.

Q. The length and beam and depth of the vessel and the sizes of her different timbers mentioned in here, were all those measurements taken by you?

A. They were taken when I made the survey.

Q. Now having made the examination of the Wash Gray internally as well as externally, what have you to say with regard to the construction of the vessel, with regard to her staunchness and strength?

A. She was a good strong little tug.

Q. You spoke of having seen the Wash Gray during the winter of 1921, probably in November or December, 1921, a year after inspection of her. As you viewed her externally and saw her running what was her appearance?

A. I just passed her in the river, I was going up the river and she was coming down, and she was looking clean and well-kept.

Q. Was there anything to indicate any breakdown in her hull or anything of that character?

A. Nothing whatever, at the time she passed us she looked like a well-kept little tug boat, that is all I can say.

135 Q. In other words, looked as though those who were operating the vessel were keeping their vessel up?

A. Yes.

Q. With respect to the oil barge you have been examined about, was she loaded at the time you made the examination?

A. No, sir, she was leaving, going to Lynchburg to be loaded, and I examined her about half-past six at night just before she left.

Q. You had no opportunity of examining her interior?

A. No, sir, never called on me.

Q. So that those for whom you made the report were aware of the circumstances under which you made it and knew it was merely an exterior examination?

A. Yes, sir. I think I stated in my report the barge was—the tug boat was alongside the barge ready to take her away when they called me in.

Q. With regard to your inspection of the Wash Gray?

A. I was aboard her two or three times before she went away.

On Re-Cross Examination.

By Mr. Dart:

Q. Was this a steel or iron tug?

A. Wooden vessel.

Q. Decks were all wood?

A. Yes, sir.

Q. Superstructure all wood also?

A. Yes, sir; it was all new.

Q. All new?

A. Deck was new, deck beams, and super-
136 structure were new.

Q. Bitts new too?

A. Yes, sir. She was absolutely rebuilt. I don't think there was but very little old timber left in her.

137 C. A. BARBOUR, a witness for libelant, being first duly sworn to tell the whole truth, testified as follows:

On Direct Examination.

By Mr. Grace:

Q. Captain, what official position do you occupy with respect to the libelant in this case, the Compania de Navegacion, etc?

A. I am president of the company.

Q. How long have you been such?

A. Ever since the organization.

Q. That was when?

A. About twelve years ago.

Q. What is your business in so far as it relates to water craft?

A. You mean the Cia or myself?

Q. Take that for instance. Of course I am speaking of you personally, your own personal experience with respect to water craft.

A. I have been in the towboat and barge business for about twenty-five years.

Q. Do you know where the tug Wash Gray was purchased?

A. Yes.

Q. Did you attend to the purchase of the vessel?

A. Yes.

Q. Where was she purchased?

A. From Pittsburgh Coal Co. at Pittsburgh; but she was lying at Paducah, Kentucky.

Q. Out of service?

138 A. Yes, sir.

Q. That is, not at that time employed?

A. Not when I purchased her. I bought two boats from the Coal Company, one at Pittsburgh and one at Paducah at the same time.

Q. After you had purchased the tug Wash Gray what if anything did you do to her with regard to reconstruction or repair or rebuilding?

A. We towed her to Morgan City, and rebuilt her.

Q. Rebuilt her?

A. Rebuilt her absolutely from her keel up.

Q. So that when you got through with her at Morgan City what was she as compared with a new boat?

A. She was practically a new boat except her engines; we put in new boiler but kept the old engines and rebuilt them.

Q. And the boiler you put in at that time was a new boiler?

A. Yes, sir.

Q. What was the size of that boiler?

A. To the best of my recollection it was about nine feet in diameter, about ten and a half feet long, Scotch Marine boiler.

Q. That is the best type of marine boiler?

A. Yes, sir.

Q. What have you to say with respect to her engines?

A. They were regular twin screw engines.

Q. And as to their condition?

139 A. They were in good shape. We rebuilt them, took them out and every piece went through the shop.

Q. So that as compared with new engines they were what?

A. They were practically as good—I would say 80% as good as new engines.

Q. And her other equipment on board, steam equipment, pumps and things of that sort, what was their physical condition?

A. I believe every pump in her was new except one and that was a bilge pump, and that was put through the shop and new packing and new rings put in it.

Q. For service it was as good as a new pump?

A. Yes, sir.

Q. When this vessel was taken down from Galveston to Tampico, by what concern was the towing service performed?

A. Southern Pacific Steamship Co.

Q. What ship was it in particular? Do you recall what ship took her down?

A. Topila.

Q. I understand you looked for the original of the letter relating to the agreement between yourself and the Southern Pacific Steamship Line for the towage of your tug Wash Gray from Galveston to Tampico, and you are not able to find it, and have secured this copy from the Southern Pacific Steamship Co.'s office?

A. Yes, sir.

Q. So that the original has been lost or mislaid?

A. The original of this letter was sent to
140 Tampico for their records, but the conditions two years ago were such that it was evidently lost in the mail and never received there.

Q. Will you read into the record here the letter setting out the terms and conditions of the contract between Southern Pacific Co. and yourself relating to the towage of the Wash Gray from Galveston to Tampico?

A. "New York, N. Y., Oct. 29, 1920.

Towing of Tugboat Galveston to Tampico for Account Mr. C. A. Barbour.

Mr. C. A. Barbour,
602 First National Bank Bldg.
Houston, Texas.

Dear Sir:

Confirming our exchange of telegrams regarding towage of tugboat from Galveston to Tampico by one of our tank steamers, leaving Galveston about November 3rd:

It is understood that you will have tug sufficiently manned, and maintain steam during the entire voyage,

in order to assist ship in handling tow, for which you will pay to General Agent Williams, upon delivery of tugboat to steamer, the sum of $1,800.00. As explained in my telegram of October 28th, if steam is not maintained on the tug during the entire voyage, charges will be assessed on basis of $2,000.00 for the tow, Galveston to Tampico. All other conditions are to be the same as those under which previous tows have been handled.

I have telegraphed Mr. Wilkins accordingly, and also advised you by wire to get in touch with him concerning details of the tow.

Yours truly,

(Sgd.) C. W. JUNGEN."

Mr. Grace:

Libelants offer in evidence copy of letter received from Southern Pacific Steamship Lines of the above purport, the original not being offered because of its
141 having been lost in the mail, marked for identication Libelant's Ex. 4.

Q. That related to the same identical tug Wash Gray that was lost on the trip up from Tampico to Galveston by way of Freeport?

A. Yes, sir.

Q. It is stated in that letter that "all other conditions" (than those named in the letter itself) "are to be the same as those under which previous tows have been handled." I show you copy of a letter dated April 19, 1920, relating to towing of oil barges by the Southern Pacific Co. and ask you if this copy was furnished you by Mr. Jungen of the Southern Pacific Steamship Co. as copy of the original letter, and if so far as your recollection is concerned it is a true and correct copy of the letter received by you respecting that service?

Mr. Dart:

We desire to object to the question as well as to the documentary evidence already offered, and the documentary evidence that counsel is now about to offer, on the ground that they are irrevelant, incompetent, immaterial, not the best evidence, not sufficiently prove, and are matters about which the witness has no actual knowledge, and move to strike out any testimony given in answer to this question as well as subsequent questions; and move to strike out the exhibit already offered and such exhibits as may hereinafter be offered along the same line; it being understood that this objection and motion shall be considered as having been made without renewing same.

142 Q. You are the Capt. C. A. Barbour mentioned in that letter, to whom that letter is addressed?

A. Yes, sir.

Q. And you have personal knowledge of the contents of that letter?

A. Yes, sir.

Q. Now in this previous letter that was offered it speaks of "all other conditions are to be the same as those under which previous tows have been handled." Now where in the letter is there anything with respect to the agreement made between you and Southern Steamship Co. through Mr. Jungen, which relates to that point?

A. In the third paragraph.

Q. What is set out in the third paragraph that covers that particular subject?

A. "It will be necessary for you to furnish crew for the barges, if necessary, to assist in steering, deliver barges to the ship outside the bar at Galveston and relieve her of same outside the bar Tampico, assuming all

risks in connection with the tow, and made good any damage that may be sustained by steamer or its equipment in connection therewith."

Q. Have you had frequent occasion to engage the services of the Southern Pacific in towing matters?

A. I would say the Southern Pacific have towed fifteen or twenty tows for me from Galveston and New Orleans to Tampico in the last ten years.

Q. Have the Southern Pacific Steamship people ever made a contract with you for the towage of any character of water craft wherein they did not require that the owner of the tow should stand all the risk and responsibility such as is covered in the paragraph you have read from in the letter of April 1920?

A. No, sir.

142 Q. They have always insisted on the tow being responsible?

A. Yes, sir.

Q. Both with respect to the loss or damage to the tow as well as damage that the towing steamship or vessel may sustain?

A. Yes, sir.

Mr. Grace:

Libelant offers in evidence copy of letter of April 1920, identified by the witness, the original not being offered because of having been lost in the mail, and ask that it be marked for identification Libelant's Ex. 5.

Mr. Dart:

We object to the document offered for the reasons heretofore stated.

Q. I show you copy of letter of January 22, 1921, and ask you where the original of that letter is and from whom that letter was received?

A. The question is, Where the original of this is?

Q. Yes.

A. I can't say. When we were taking this equipment into Mexico these records were supposed to be kept in Mexico, and the only reason I can say that we haven't got them is that they were sent to our Mexican office and they were lost in the mail or something happened to them.

Q. You are not able to produce the original?

A. No, sir.

144 Q. Will your own personal recollection serve you sufficiently to say that is a copy of the contract made between yourself and the Southern Pacific Co?

A. Absolutely.

Mr. Grace:

Libelant offers in evidence letter of January 22, 1921, in connection with the witness' testimony, and ask that it be marked Libelant's Ex. 6, with particular reference to paragraph 4 thereof which reads as follows:

"You will supply any crew that may be necessary on the barges to assist in towing, and assume all risks, reimbursing us for any damages that may be sustained by steamers or their equipment in performing this towing service".

Mr. Dart:

We object to that document, and ask that it be stricken out for the reasons heretofore urged.

Q. I show you letter dated New York December 28, 1920, and ask you if that is the original received by you from Southern Pacific Company Atlantic Steamship Lines?

A. Yes, sir, this is the original.

Q. You recognize that as the original?

A. Yes, sir.

Q. Was such a contract as is embodied in that letter entered into between you and the company?

A. Yes, sir.

Q. On the terms and conditions therein stated?

A. Yes, sir.

Mr. Grace:

This letter of December 28, 1920, is offered in evidence, marked Libelant's Ex. 7.

145 Q. Captain, this company of which you are the president, Compania de Navegacion Interior, S. A., they were owners of the steam tug Wash Gray from the time of her loss—how far back?

A. Well, at those dates it was a hard matter to change the papers of American boats to foreign register, at the time the "Wash Gray" was purchased, and the only way I could get that done was to go to Washington; so I purchased the boats in my name at Pittsburg and they were carried so until they left Galveston, and when they left Galveston they were put in the register in the name of the company.

Q. That was back in November 1920?

A. Yes, when the Wash Gray left; the other boat left previous to that.

Q. And from that time on to the time of her loss as referred to in this case your company was sole exclusive owner of the vessel?

A. Yes, sir.

Q. Now in the policies that are mentioned herein that company is mentioned as the assured and you also are mentioned as assured. In the pleading it is stated that

you are satisfied judgment should be rendered herein in favor of the libelant, The Compania de Navegacion Interior S. A.? that is correct?

A. Yes, sir.

Q. So that any judgment that will be entered in favor of that company will conclude all your rights in the premises?

A. Yes, sir.

Q. Captain, as president of the company you
146 have attended the sittings at Houston and here at Galveston in the taking of this testimony and have heard the witnesses testify to the fact that the various towboat companies on the Gulf have as a matter of universal practice required so far as outside towage services are concerned that the service shall be rendered exclusively at the risk of the tow? you have heard that testimony?

A. Yes, sir.

Q Have you had such practice and such experience, and have you kept up with the customs on the Gulf here with respect to towage service, to enable you to state a personal opinion on that?

Mr. Dart:

We object to the evidence along that line, particularly to the question asked, on the ground it is irrelevant, incompetent and immaterial and not the best evidence, and that the proper foundation has not been laid; and move to strike out the answer. It is agreed that the same objection shall apply to all questions along the same line, and the same motion shall apply.

A. In all my experience in having tows made and towing for others, it has always been the practice that that risk of towing was the owner's risk.

Q. At the risk of owners?

A. Owner's risk.

Q. Which owner?

A. The man that owned the tow.

Q. And not at the risk of the owners of the
147 towing ship or tug?

A. No, sir.

Q. Now have you had much towing done between American ports and foreign ports—Mexican ports?

A. We have been towing there fifteen or sixteen years.

Q. In that particular service have you made any rules with regard to charges and conditions under which the towage service is to be made?

A. All are the same, all I have come in contact with.

Q. So that this requirement that the tow shall be handled by the towing ship or tug at sole risk of the tow, is one of general practice in the Gulf according to your own experience?

A. Yes, sir.

Q. And that you say has extended over a period of—how long?

A. Towing from American ports to Mexican ports? About sixteen years.

Q. And that towing has consisted in the handling of what kind of vessels generally?

A. Stern wheel boats, that is river boats, American river boats; tugs and oil barges.

Q. The Wash Gray, was she an inland or outside vessel?

A. She was an inland boat.

Q. Just for navigating inland waters?

A. Yes, sir.

Q. Captain, what experience have you had in building and constructing water craft?

148 A. Well, we have built all of our boats or practically all of them.

Q. What part have you taken in the building of them?

A. I have always superintended our own work.

Q. Now when you say "our work" are you confining it simply to the libelants in this case or to other vessels—

A. To all of my practice and experience.

Q. And that experience in the construction of water craft generally has covered about what period of time?

A. About 25 years.

Q. And it has related to the construction of what character of water craft?

A. Ocean-going barges and inland barges—boats.

Q. Inland boats such as tugs, steamboats and things of that sort?

A. River boats, yes, sir.

Q. The repairs of the Wash Gray testified to by you in this case: Under whose supervision and direction was that conducted?

A. Well of course I saw her on the ways, and then we put one of our superintendents in charge and he tore her down; but I was there every two or three weeks.

Q. Then while it was under that man's particular supervision did you exercise any supervision at all?

A. Oh, yes, I generally supervised the whole thing.

Q. With regard to that vessel when she was completed what have you to say concerning her construction?

149 A. She was in fine shape. We spent all the money necessary to put her in the best possible shape.

Q. Both as to woodwork, machinery and everything else?

A. Yes, sir.

Q. Now, captain, after she was taken down to Tampico in November, 1920, did you have occasion to see her after that?

A. At those times, up to about six or eight months ago, I used to make a trip into Mexico about every sixty days.

Q. And on those occasions when making those trips in there would you see the Wash Gray?

A. Oh, yes, I would visit all the boats.

Q. What was your object and purpose in going over all the boats and the Wash Gray in particular?

A. To see what kind of shape they were in.

Q. Whether they were kept up or not?

A. Whether they were kept up or not.

Q. What have you to say with regard to the upkeep of the Wash Gray?

A. She was in as good shape as she could be kept.

Q. Going back into June, about the 6th of June, 1922, just before she undertook this trip from Tampico to Freeport, how long previous to that had you seen the Wash Gray, that is been aboard her and looked her over?

A. I was in Tampico on the 17th of March.

Q. The preceding March, 1922?

A. Yes, sir.

Q. And on that occasion did you go over the Wash Gray?

A. Yes, I was all over her.

150 Q. What did you find to be her physical condition as to hull, machinery, etc?

A. She was in good shape, working every day.

Q. In your opinion was she as well fitted to make the trip from Tampico to Galveston or practically as well fitted as she was on the trip from Galveston down to Tampico, excepting of course she had to be boarded up if the surveyors required it?

A. Yes, sir.

Mr. Dart:

We object to that question as being irrelevant, incompetent and inadmissible, calling for a conclusion of the witness, is leading and suggestive, and move to strike out the answer given to it.

Q. Take vessels that are built and rebuilt and reconstructed as the Wash Gray was in 1920, what has been your own experience should be the life of such vessels kept up as the Wash Gray was kept up?

A. Well the tug ought to last ordinarily ten to twelve years.

Q. What class of men did you employ on board the Wash Gray to operate her, her officers particularly?

A. Mexican crew.

Q. What have you to say of the manner in which they looked after the vessel, machinery, etc.

Mr. Dart:

We object to that on the ground that it is not shown that the witness has any personal knowledge of the matter sought to be brought out by the question, and on the ground that the evidence sought to be elicited would be hearsay and not the best evidence.

151

Q. I am speaking now, Captain, of the various occasions when you testify that practically every sixty days you were on that boat and looked her over. I am speaking about what your observation disclosed to you then as to the conduct of the chief engineer and master of that vessel with respect to the unkeep of that vessel?

A. We have a general superintendent of all our boats who is an American. He sees that repairs are made as they should be made and when needed, and for that

reason and in that way we keep our boats in the best possible shape. I might say that the Mexican crews are as good as you can get in the country.

Q. So that even as to the crew, getting the best you could have, you had over them a general superintendent—an American?

A. Yes, sir.

Q. In addition to these years of experience that you have had in the building and rebuilding of water craft, especially for inland waters, have you taken any active part in the handling of steam vessels?

A. Yes, sir, I am master as well as engineer.

Q. You hold a license from the United States government both as master and as engineer?

A. Yes, sir.

Q. How long a period of time?

A. Have had the engineer's license for about
152 28 years.

Q. And master's papers?

A. About 25.

Q. You hold pilot's papers also?

A. Yes, sir.

Q. You hold them from the United States government?

A. Yes, sir.

Q. You have them how long?

A. Held them and the master's papers about the same time, about 25 years. I hold an ocean-going certificate too for engineer.

Q. Any other ocean-going certificate?

A. No, they are all inland except the engineer's.

Q. Captain, in the handling of your water craft, especially in these matters of towage, outside towage, were you ever called upon by underwriters or under-

writers' surveyors to exhibit to them the contract that you had with the party that was to do the towing?

A. Never.

Q. If Mr. James F. Taylor of Tampico or Mr. Verne Dyer at Tampico, or any other of the underwriters' representatives or agents, had sought any knowledge concerning the nature and character of the contract you had for towage would you have furnished it?

A. Gladly.

Q. As matter of fact when your proofs of loss were sent in did you attach a copy of your towing contract itself to the proofs of loss?

A. Yes, sir.

153 Q. Was there ever at any time any intention of any sort or any desire on your part to conceal anything from the underwriters with respect to anything concerning the Wash Gray or insurance or the towage contract?

A. Absolutely not.

Q. And with respect to the towage contract that you made with the Freeport Sulphur Co., was that out of the ordinary run or was it of the general nature of towage contracts?

A. It is the only towage contract we have been able to make.

Q. There was nothing special about it?

A. No, sir.

Q. Was there anything said by the Freeport Sulphur people, the owners, operators, master, officers or crew of that vessel that for a larger compensation that they would assume any of the risks or hazards of the tow or that the tow was exposed to?

A. No.

Q. Has Mr. Taylor on any other occasions participated in the examination of any vessel that you have had for towage purposes?

A. No, sir.

Q. Had Mr. Verne Dyer acted in that capacity as surveyor for any vessels you have had towed?

A. Yes, sir, he has represented the insurance companies in every case heretofore.

Q. Solely?

A. Yes, sir.

154 Q. And on any one of those occasions did he ever ask for the contract that existed between yourself as representing the owners of the tow and the towing company?

Mr. Dart:

We object to the question on the ground it is irrelevant, incompetent and immaterial not the best evidence and not shown that the matter sought to be brought out by the question is within the witness' knowledge or that he had any actual knowledge thereof.

A. No.

Q. Captain, you would have knowledge if you were asked by Mr. Dyer for the contract?

A. I would think so.

Q. You have no knowledge of any such thing?

A. No, sir.

Q. Never done?

A. No, sir.

Q. In all your years of experience in the towing business have you ever known any instance where any surveyor representing the underwriters or the underwriters have asked for a view of the contract which related to the towing of the vessel?

A. No, sir.

Q. Where the underwriters require that a certain person shall examine the vessel and pass upon her and the towing arrangements,—what do you understand by that?

A. They are to look the vessel over and see if she is seaworthy for the voyage, and to determine as to what size hawser they might have to use, and as to her equipment, pumps, etc.

Q. In other words, they all relate to the handling of the vessel itself from the port of departure to the port of destination?

A. Yes, sir.

Q. And they are not concerned in any way whether the towage service is to be performed for nothing or at an exorbitant rate or otherwise?

A. No, sir.

Q. Whether the contract be written or verbal, is there ever any difference made in the terms and conditions thereof, especially the terms and conditions with respect to assumption of liability or damage to the tow by the owner of the tow?

A. It has always been our understanding if we handled a tow for the other fellow or he handled ours that the tow was at our risk or at his.

Q. Was at whose?

A. The tow at his own risk, not at the risk of the tow boat, whether it be ours or somebody else's.

Q. So the service, where you are rendering the towage service and where you are having towage service done for you or your company, that has always been the condition that towage was at the risk of the owners of the tow whether the contract was in writing or verbal?

A. Yes, sir.

Q. On those occasions where the vessel has been towed, your own vessel, for instance when the
156 Wash Gray was towed from Galveston to Tampico, was she insured?

A. Yes, sir.

Q. When you have had other vessels towed, barges and things of that sort, such as mentioned in the Southern Pacific Steamship letter, where it has been specially stipulated that the tow is at the risk of the tow and her owners, have those boats always been insured too?

A. All of them, yes, sir.

Q. Was there at any time directly or indirectly any understanding by and between you and the contracting parties representing the S. S. Freeport Sulphur No. 1 in the towage of the Wash Gray from Tampico on this trip when that tug was lost, at what speed or rate of speed that tug would be towed?

A. No, sir.

Q. Your contract, was it for a per diem compensation or lump sum?

A. Lump sum.

Q. It being in a lump sum was it of any importance to you whether that vessel took three, four or five days or that many weeks in bringing the tug up?

A. No, sir.

Q. No importance to you one way or the other?

A. No, sir.

Q. So the question of time or what time was consumed by the Freeport Sulphur No. 1 did not in any way affect you?

A. No, sir.

Q. What is the distance, taking the run of vessels as they run from Tampico on up to Freeport, what is the distance?

157 A. About 390 miles from bar to bar.

Q. That would be the ordinary statute miles?

A. Statute miles, yes, sir.

Q. Were you on board the S. S. Freeport Sulphur No. 1 or on board the tug Wash Gray on this trip coming up from Tampico?

A. No, sir.

Q. Then you have no personal knowledge concerning the handling of the Wash Gray on that trip?

A. No, sir.

Q. In the letter of the Freeport Sulphur Co. which has been offered in evidence setting out the terms of the contract for the towage of the Wash Gray to Freeport from Tampico to Freeport, it is stated when it was they anticipated the Freeport Sulphur No. 1 would sail for Tampico and when it was anticipated she would leave Tampico, and when it was they thought she would arrive at Freeport. Was there any special purpose of object in setting out approximately or anticipating those particular dates?

A. First, in order that we might have the tug ready at Tampico in order not to detain the ship. Second, that we might have a tug from Galveston standing off the bar at Aransas Pass to pick the tug up to deliver to Galveston in order that she would not have to lay at anchor.

Q. Then these dates when they were given, were they given with the understanding that those would really be the dates and the time within which the boat would have the tow.

158 A. No; you always consider the weather and delays for any reason or another.

Q. So if there was any incident or any occurrence of any nature which would have occasioned delay in the requirements of good seamanship and proper towage that was to be covered by your contract?

A. Yes, sir.

Q. Did your company by and through you or by any other officer that might be authorized in the premises, make any declaration to underwriters' representatives agents or attorneys or otherwise, that the Wash Gray was towed too fast?

A. No, sir.

Q. As a matter of fact, I understand you have no personal knowledge whatever with regard to what speed she was towed at or being towed at the time she sank?

A. No, sir.

Q. The contract that was made between the Freeport Sulphur concern for the towage of the Wash Gray from Tampico up was made between—who, who representing Freeport Sulphur Co. and who representing the Wash Gray?

A. Between Mr. Mims and myself.

Q. Mr. Mims representing Freeport Sulphur Co.?

A. Yes, sir.

Q. And you representing the libelant company of which you are president?

A. Yes, sir.

Q. Was that contract ever modified or altered or amended by any letter or other agreement or contract or understanding?

A. No, sir.

Q. Who was the officer of your company
159 who directed or arranged for the procuring of the insurance on the Wash Gray on her voyage from Tampico to Galveston?

A. Myself.

Q. There is an interrogatory attached to the libel here that I will read to you as put and ask your answer to it:

"3rd Interrogatory: Did Mr. Clyde A. Barbour state to Mr. T. Catesby Jones, of No. 64 Wall St. New York City, that the tug Wash Gray was towed at an excessive speed by the steamer Freeport Sulphur No. 1?"

What is your answer?

A. No.

Q. "4th Interrogatory: Did Mr. Clyde A. Barbour suggest to Mr. Jones that the underwriters who had issued policies on the Wash Gray for the voyage from Tampico to Galveston should institute suit against the Freeport Sulphur No. 1 or her owners to recover damages for the loss of the Wash Gray?"

What is your answer?

A. No.

Q. "5th Interrogatory: Did Mr. Clyde A. Barbour state to Mr. Jones that Mr. Barbour's Company, the libelant herein, did not desire to institute suit against the Freeport Sulphur No. 1 or her owners to recover for the loss of the Wash Gray because of the close and our friendly relations between the libelant and the owners of Freeport Sulphur No. 1?"

What is your answer?

A. No.

160 On Cross Examination.

By Mr. Dart:

Q. What is the Compania Navegacion Interior S. A.?

A. In English it is the Inland Transportation Company.

Q. Is it a corporation or a partnership?

A. Corporation.

Q. Under the laws of what country is it incorporated?

A. Mexico.

Q. In what business is it engaged?

A. Inland transportation business, transportation of crude oil on the Panuco River.

Q. That is to say, you tow vessels loaded with oil?

A. Yes, sir.

Q. Is it engaged in any other business except the business of towing vessels loaded with oil on the Panuco River?

A. They take anything; but that is 85% of their business.

Q. What vessels does that corporation own?

A. You mean towboats?

Q. Yes—at the time and prior to the sinking of the Wash Gray, what vessels did it own?

A. Well, they owned the Cruiser Tamboyoche Pasceincia and Major Slack—those were all tow boats.

Q. All of them used down in Mexico?

A. Yes, all taken from this country. We built them all here and took them down there.

Q. Is your company a subsidiary corporation of some larger corporation engaged in the oil business?

161 A. No, sir.

Q. Have you a copy of the articles of incorporation of the libelant corporation?

A. Not with me.

Q. Could you get a copy of it—English translation so it can be filed in the record?

A. Yes, sir.

Q. Now was this corporation formed before you purchased the Wash Gray or afterwards?

A. About ten years before.

Q. You testified that you purchased the Wash Gray from the Pittsburgh Coal Co., is that correct?

A. Yes.

Q. When did you do that?

A. Well, that was in '19 I believe—it was in the latter part of 1919.

Q. Now it was then lying at Paducah, Kentucky, on the Ohio River I suppose?

A. Yes, sir.

Q. Was she laid up or on the ways?

A. The Coal Co.—you see she was a tug boat and they could only use her in high water and this was low water we bought her in.

Q. You brought her to New Orleans?

A. Brought her to Plaquemines and then to Morgan City through the canal.

Q. At Morgan City you had her repaired?

A. Yes, sir.

162 Q. I suppose she was towed down stream?

A. You see we bought one boat at Pittsburgh, and coming down we just picked her up and towed her ourselves.

Q. And at Morgan City you had her reconstructed and rebuilt?

A. Yes, sir.

Q. Why did you do that?

A. Because we wanted her in the best possible shape to tow to Mexico, and because we have no way down there to do any extensive repairs.

Q. So you decided to rebuild her from the keel up?

A. Yes, sir.

Q. And you put in everything new except the engines and one pump? Is that correct?

A. Yes, sir.

Q. All new timbers?

A. Yes, sir.

Q. New frames?

A. New frames.

Q. How much did you pay for her?

A. I don't remember what we paid—I think we paid $55,000—I don't remember what was paid for the Wash Gray, but I know we paid $55,000 for the Cruiser. What we paid for the Wash Gray I don't remember.

Q. Could you approximate it within a thousand dollars?

A. I could approximate it within $5000.

Q. Within $5000?

A. About $35,000, some place along there.

Q. What did you spend to repair her?

163 A. Eighty-odd thousand—we had one hundred-odd thousand dollars in her, $113,000 or $123,000 as I remember.

Q. Now you didn't use her in service in the United States at all?

A. No, sir.

Q. You had her towed direct to Mexico?

A. Yes, sir.

Q. Where she was engaged in towing vessels?

A. Yes, sir.

Q. She never was engaged in any outside towing, was she?

A. No, sir.

Q. And after she was once towed down to Mexico you never had occasion to tow her back to the States, did you?

A. We were using her and we bought her for the Mexico business.

Q. You used her continuously? in other words, after you brought her down to Tampico you used her in that locality until she started back to the States on this trip?

A. Yes, sir.

Q. Now where is your office or your headquarters?

A. Mine?

Q. Yes—the Company's?

A. Has no office in this country.

Q. Where is your personal office?

A. 602 First National Bank Building, Houston, Texas.

Mr. Grace:

Your company does have an office—where?

A. At Tampico—it is a Mexican corporation.

164 Q. Where do you spend the majority of your time? In your office in Houston or in Tampico?

A. Houston.

Q. How much time during the year, or to put it in another way: What percentage of the year do you spend in Tampico?

A. Up to six or eight months ago I made a trip about every sixty days on which trips I would spend about two weeks.

Q. In other words, you would go down to Tampico on one of your vessels—

A. No, mostly go by rail when the railway was open.

Q. And stayed down there two weeks?

A. Yes, sir—as long as I thought it was necessary to stay.

Q. You did that up to six months ago?

A. Yes, sir or eight months ago.

Q. How long had it been your habit to make these visits of sixty days apart?

A. Ten or twelve years.

Q. Now you were not in Tampico when the Wash Gray sailed or began her voyage to Galveston, were you?

A. No, sir.

Q. How long before her departure had you been in Tampico?

A. I think it was the 17th of March, 1922, I was there.

Q. And she left Tampico according to your information in June, 1922?

165 A. 7th of June she was lost I think.

Q. Now you had no discussion or conversation with Mr. Verne Dyer about the Wash Gray on the occasion of your last visit to Tampico, did you?

A. No, sir.

Q. When was it you decided to send the vessel across the Gulf? I don't mean the exact date but approximately how long before the voyage began did you decide to send her across the Gulf?

A. I don't remember. It was previous of course, some time previous, to the date of her sailing, and we were having trouble to get ship to take her, ships were either to busy or on some other trade, and we just had to pick anybody we could get that the insurance companies would accept.

Q. So after trying several vessels or firms you got the Freeport Sulphur No. 1?

A. We only tried one and that was the Southern Pacific on account of their sailing being from Tampico to Galveston; and by taking the Freeport Sulphur No. 1 we had to send an extra boat down to Freeport to pick the tug up and deliver her here, which made two movements. What we were trying to do was to make one movement of the whole tow. But the Southern Pacific ships were running into New Orleans mostly then and the only thing left for us to so [do] was to take the Freeport.

Q. Now, of course, you know nothing of the circumstances under which the vessel was lost of your own knowledge?

A. No, sir.

Q. You know nothing of the details or the
166 circumstances surrounding the departure of the vessel from Tampico?

A. No, sir.

Q. When were you last on board the Wash Gray?

A. When I was there in March.

Q. You went on board her?

A. I go on board of all of them; that is what I go for.

Q. To look them over?

A. Yes.

Q. How long did you stay on board her?

A. I didn't stay aboard long, just long enough to look around; and some of them I get on and make a trip a day or two at a time, some of them I stay aboard only an hour.

Q. You made no trip on the Wash Gray on the occasion of your last trip?

A. I don't believe I did; I don't remember.

Q. You employed Mexican crew you say on the Wash Gray?

A. We have to, it is a Mexican ship.

Q. You have no alternative?

A. No, sir.

Q. That means Mexican officers, Mexican engineers; and the crew you had were about on the average of Mexican crews you could get?

A. Yes, sir, best we could get for that kind of voyage.

Q. Did you change the crew just prior to starting on this voyage?

167 A. Yes, because we had to have an outside crew on this voyage, and the crew we had on her previous to that were inside men.

Q. When was this boat originally constructed?

A. Well, sir, I really don't know; the papers of course would be in the Pittsburgh office.

Q. You would have no papers showing when she was originally built?

A. No, sir.

Q. Do you know where she was originally built?

A. I do not.

Q. What was the name of the firm that repaired her at Morgan City?

A. I don't know the name of the firm now but the original name of the firm was Drackett & Terrebonne. They have dissolved partnership but both continue in the same line of business.

Q. You covered the vessels with insurance on behalf of your company?

A. Yes, sir.

Q. I mean you were the man who attended to placing the insurance?

A. Yes, sir.

Q. Whom did you do that through?

A. Adams & Porter?

Q. Houston?

A. Yes.

Q. Did you show Adams & Porter or anybody else a copy of the contract you made with Mr. Mims
168 on or about May 18?

A. No, sir, never asked for it.

Q. Does that letter addressed by Mr. Mims to you which Mr. Mims offered in evidence yesterday state the entire agreement between you?

A. Yes, sir.

Q. You had no other letters or side agreements about that?

A. Nothing at all.

Q. Had no "gentlemen's understanding" of any different character from what is contained in the letter?

A. No, sir.

Q. Did you pay the $1200 referred to in the contract for the towage services?

A. I did.

Q. You paid that after the Freeport Sulphur No. 1 arrived on the Gulf coast? after the voyage in other words?

A. Yes, sir.

Q. You say you know a man named Verne Dyer?

A. Yes, sir.

Q. Down in Mexico?

A. Yes, sir.

Q. He is marine surveyor down in Tampico?

A. Yes, sir, Lloyd's Surveyor.

Q. He doesn't do business up here in the States?

A. No, sir.

Q. His operations are confined to Tampico and vicinity?

169 A. Yes, sir.

Q. Did you ever communicate to Mr. Dyer the fact that in your contract with Freeport Sulphur Company you agreed to assume all risk of loss or damage to the tow?

A. Never have seen him or had a scratch of a pen from him since the accident.

Q. You never wrote to him or communicated that fact to him?

A. No, sir.

Q. And he never asked you?

A. No, sir.

Q. Nor did you communicate that fact to anybody else, did you?

A. No, sir.

Q. Do you know Mr. James F. Taylor?

A. No, sir.

Q. Never heard of him?

A. I have heard of him but never saw him, never met him,—never even saw him.

Q. Do you know whether or not your company requested Mr. Taylor to make a survey of the Wash Gray?

A. Yes, sir.

Q. It did.

A. Yes, sir.

Q. Was that prior to starting on the voyage from Tampico to Galveston?

A. Yes, sir.

Q. Of course you don't know whether Mr. Taylor actually made that survey or not of your own
170 knowledge?

A. I have read his report.

Q. You know that only from the report he made?

A. Signed by him.

Q. Which you have copied in your libel?

A. Yes.

Q. Who is Captain Barbour?

A. I guess I am the fellow they are talking about.

Q. Is there any other Captain Barbour except yourself?

A. My eldest son is in Mexico and they always call him—but they call him Captain Jesse.

Q. He is Captain Jesse Barbour?

A. Yes.

Q. He is stationed at Tampico?

A. Yes.

Q. But you personally had no conversation with Mr. Taylor?

A. None at all.

Q. Did you ever communicate to Mr. Taylor the fact or the contents of the contract you had with Freeport Sulphur Company?

A. No, sir.

Q. Did you send a copy of the towing contract down to your Tampico office after it was made?

A. Yes, sir.

Q. How soon afterwards?

A. I don't remember—in due course of business.

Q. You mean immediately after it was exe-
171 cuted?

A. No, it may have been three or four days because the mail accumulates—you see we accumulate a lot of mail and send it in batches.

Q. The contract is dated May 18, 1922, and the boat sailed in the early part of June?

A. Yes.

Q. Do you know whether or not you sent the contract down there before the vessel sailed?

A. I really don't.

Q. What would be your object in sending the contract down there?

A. Just for record.

Q. Did you communicate to any of your people, any of the officers or employes of your company in Tampico before sending the contract to them the contents of the contract or the terms on which towage was to be made?

A. No.

Q. In other words, until they actually received copy of the contract your people in Tampico would have no actual knowledge of the conditions under which the contract was undertaken?

A. They weren't interested because the contract was made in this country between me and Mr. Mims, and the only thing they had to do was to get the boat ready to make the trip. That is as far as they were interested.

Q. You did not give copy of that contract to Adams & Porter who you say acted as brokers in placing the insurance?

A. You mean while they were working on
172 the insurance?

Q. Yes.

A. No.

Q. This tug boat was what, wooden vessel or steel vessel?

A. Wooden.

Q. Was she coppered bottom?

A. She was copper—

Q. Copper painted or copper bottomed?

A. Copper bottom.

Q. Covered with copper sheeting in other words?

A. Yes, or yellow metal as we call it.

Q. After the vessel was repaired at Morgan City and prior to her departure for Tampico who surveyed her? What marine surveyor?

A. J. C. Grant.

Q. Was he the only one who surveyed her?

A. Yes, sir.

Q. My opponent asked you certain questions covered by the interrogatories propounded to the libelant which are annexed to and made part of the answer: Paragraph (a) of the first interrogatory asks whether or not said contract was modified, altered or amended by any letter or other agreement contract or under standing. Please state whether or not said contract was amended, altered or changed by any other agreement?

A. No.

Q. Did you have any conversation with Mr. T. Catesby Jones, of Bigham, Englar & Jones, No. 64
173 Wall Street, New York City, at any time with reference to your claim against the underwriters in this case?

A. Yes, I was in his office.

Q. How did you happen to go to his office?

A. By request.

Q. What happened after you got to his office?

A. Well, the proposition was just discussed in a general way.

Q. You mean the circumstances surrounding the loss of the Wash Gray?

A. Most of the discussion was based on a compromise. Mr. Jones said he was open for compromise in the matter. I said, Mr. Jones we either want what we paid for her or we don't want anything at all.

Mr. Dart:

We object to the answer as being irrelevant, incompetent and immaterial, and move to strike out the same.

Q. Did you say anything to Mr. Jones about instituting suit against Freeport Sulphur No. 1?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. Was that matter discussed?

A. No, sir.

Q. Did you discuss the fact that the relations between your company and the Freeport Sulphur Co. were very friendly?

A. No, sir.

174 Q. Didn't mention that at all?

A. No, sir.

Q. Did you discuss the speed at which the Wash Gray was towed by Freeport Sulphur No. 1?

A. No, sir.

Q. Did anybody at that conversation say that the Wash Gray had been towed at an excessive rate of speed by Freeport Sulphur No. 1?

A. Not that I recall.

Q. There is no other Mr. Cylde A. Barbour except yourself, is there?

A. Clyde A. Barbour, Jr.

Q. Was he in New York?

A. No, sir.

Q. Did he ever have a conversation with T. Catesby Jones to your knowledge?

A. No, sir.

Q. Is it a fact that the relations between your company and yourself on the one side and the Freeport Sulphur Co. on the other are rather friendly?

A. They always have been friendly.

Q. You are and always have been very good friends?

A. Same as we are with the Southern Pacific or anybody else in the same business.

Q. And the same is true of the officers of the Freeport Sulphur Co., the individuals who run the business—Mr. Mims for instance and yourself are personal friends, are you not?

A. Have been for a number of years.

Q. Of course you would not think of suing
175 Freeport Sulphur Company in a matter of this kind?

A. If I had a suit against them I would just as soon sue them as anyone else.

On Re-Direct Examination.

By Mr. Grace:

Q. You were asked with regard to surveys made by Mr. James F. Taylor at Tampico, that he made the survey at the request of your company: At whose instance did your company ask him to make that survey?

A. Insurance companies'.

Q. And you spoke of having received certificates from Mr. Taylor and Mr. Verne Dyer respecting the result of their surveys?

A. Yes.

Q. Look at these two certificates and state whether they are the two certificates referred to and that Mr. Dart mentioned as being copied in the libel?

A. They are.

Mr. Grace:

Libelant offers in evidence the two certificates identified by the witnesses as certificates of James F. Taylor and Verne Dyer, marked Exhibits 8 and 9 respectively.

On Re-Cross Examination.

By Mr. Dart:

Q. Who paid the fees of Mr. Dyer and Mr. Taylor for making these surveys?

176 A. My company.

Q. And the reports of their surveys were sent to your company?

A. Yes, sir.

Q. Which are the documents you have just offered in evidence?

A. Yes.

Mr. Dart:

We object to the documents offered on the ground they are irrelevant, incompentent and immaterial, not the best evidence, and are self-serving declarations, and move to strike the same from the record.

On Re-Direct Examination.

By Mr. Grace:

Q. Do you know whether these gentlemen sent duplicates to the underwriters themselves of the result of their surveys?

A. Yes, sir.

177 LIBELANT'S EX. 3.

(Copy.)

J. C. Grant,
Marine Surveyor and Appraiser,
Cotton Exchange Building.
Galveston, Texas, November 29th, 1920.

This is to certify that the undersigned Marine Surveyor did at the request of the Underwriters, inspect the Wood Twin Screw Tug "Wash Gray" 105 tons of Houston, Texas, owned by the Cia de Navegacion Interior S. A., while the tug was lying afloat at Pier "22" this port on November 27, 1920, and subsequent dates, for the purpose of ascertaining and reporting on her present condition and upkeep, also to make recommendations with regard to fitting her up for the voyage to Tampico, Mexico in tow of the Steamer "Topila."

This tug has just been rebuilt, frames, planking, decks, and deck houses are entirely new, being reconstructed at Morgan City, La. by the Intercoastal Shipbuilding Company.

She is of the following dimensions: Length 87 feet, Beam 19 feet, Depth 9 feet.

On examination as far as possible, the tug was found to be well and strongly constructed, frames 4" x 8"—12" centers, planking 3", four 16" x 16" athwartship beams tied with hog-chains; the hull being perfectly watertight.

On the main deck a house is constructed over the engine-room and boiler-room, the forward end of the house forming the galley and mess-room and the after end, accommodation for the crew. On top of this house

is the pilot house with accommodation for two men. The houses being new they are in first class order and condition.

178 The propelling machinery consists of two twin condensing engines 11″ x 14″, these have been thoroughly overhauled and the auxiliary machinery is all practically new. From an external examination they are in good order and condition.

Steam is supplied from a Scotch Marine Boiler working at a pressure of 140 lbs. The boiler is well secured in position, covered with an asbestos compound, which thoroughly protects the woodwork in the vicinity of it; the smokestack passes through an iron air casing in the roof of the house, the woodwork being protected with sheet iron and asbestos.

Oil is used for fuel which is stored in a steel tank at the fore end of the boiler, the tank being well secured in position and has a capacity for about 110 barrels. The oil is forced to the burners by pumps, cut-offs from tanks to pumps and burners are apparently quite tight, and the filling arrangements are of an approved type.

A steel fresh water tank is also installed at the after end of the engines, this has a capacity for about 70 barrels.

The fire room floor is protected with sheet iron and drip pans are placed under the burners.

She is lighted by electricity throughout, switchboard being clear of the woodwork and all wiring run through iron conduits.

The fire pump is placed on deck at the after end, fire line leading to both sides of the house and to the pilot house with seven connections, each having a separate cut-off. 150 feet of fire hose with nozzles are on board. Four patent fire extinguishers, fire axes, and fire buckets all new.

179 The galley stove is in the house at the fore end, the stove is well secured and the woodwork in the vicinity of it protected from the heat.

In case of an accident and the tug leaking, she is fitted with one 3″ and two 2″ steam syphons which are in good working order.

She has the regulation navigation equipment, also a steam capstan at the fore end and two hand capstans at the after end.

She is also equipped with steam steering gear which is controlled from the pilot house.

The forward towing bitts are 12″ x 12″ with a table connecting them together, these bitts pass through the deck and are securely fastened in the bottom of the tug.

For fitting her up for the voyage, the following recommendations were made and carried out.

All doors and windows in the lower house to be thoroughly boarded up.

Anchor to be secured and put in handy position in case of use.

Steam to be kept up on the boiler during the passage, and a sufficient quantity of coal to be put on board for this purpose, there being no oil fuel on board the tug at present.

The tug to have a 1-1/8″ bridle properly secured to the forward towing bitts, and to have a crew of at least five men on board to attend to the tug's safety during the voyage.

Signals to be arranged between the Captain of the tug and the Captain of the Steamer; and everything done to put the tow in a safe condition to proceed on the voyage.

J. C. GRANT,
Marine Surveyor.

180 LIBELANT'S EX. 4.

Libelant's Exhibit No. 4—Letter, C. W. Jungen to C. A. Barbour, Oct. 29, 1920—omitted, being heretofore copied at page 136.

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181 LIBELANT'S EX. 5.

New York, N. Y., April ...., 1920.

Towing of Oil Barges.

Capt. C. A. Barbour,
602 First National Bank Bldg.,
Houston, Texas.

Dear Sir:

Confirming our oral agreement this date, it is understood that the Southern Pacific Company, Atlantic Steamship Lines, will arrange to tow with its tank steamers Torres or Topila, from Galveston to Tampico, six oil barges belonging to you, on one of which is to be loaded the stern-wheel steamer Cruiser, for the sum of $1500.00 per barge, or a total of $9000.00.

The price quoted is to represent towing service from bar to bar only, and is exclusive of hawsers and other towing equipment, harbor dues, pilotages, etc., all of which will be for your account.

It will be necessary for you to furnish crew for the barges, if necessary, to assist in steering, deliver barges to the ship outside the bar at Galveston and relieve her of same outside the bar at Tampico, assuming all risks

in connection with the tow, and make good any damage that may be sustained by steamer or its equipment in connection therewith.

It is understood that payment for towage services as above will be made through General Agent Wilkins at Galveston as each barge is delivered to ship, and that you will call upon him for such towage as may be required in handling the barges at Galveston, which service will be rendered at the established harbor rates.

I understand the first barge will be ready for towing during the present month, and that you expect to complete delivery at the rate of two per month.

I am sending copy of this letter to Mr. Wilkins with whom you can arrange necessary details on the above basis.

Yours truly,
(Sgd.) C. W. JUNGEN.

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182 LIBELANT'S EX. 6.

New York, N. Y., Jan. 22, 1921.

Towing of Barges by Tank Steamers.

Capt. C. A. Barbour,
602 First National Bank Bldg.,
Houston, Texas.

Dear Sir:

Acknowledging your letter of January 19th, concerning the six steel barges which you desire to have towed to Tampico by our tank steamers Torres or Topila:

I note three of these barges will move via New Orleans and three via Galveston, and we will be willing to perform this service for you under the following conditions:

1. Charge for towing from New Orleans to Tampico to be Two Thousand Dollars ($2000.00) per barge; from Galveston to Tampico, Fifteen Hundred Dollars ($1500.00) per barge.

2. Above prices exclusive of hawsers, and other towing equipment, harbor dues, pilotages, etc., all of which will be for your account.

3. Barges must be delivered to our steamers outside the bar at New Orleans or Galveston, and steamers relieved of them outside the bar at Tampico. Under no circumstances will steamers be expected to tow barges down the river at New Orleans.

4. You will supply any crew that may be necessary on the barges to assist in towing, and assume all risks, reimbursing us for any damages that may be sustained by steamers or their equipment in performing this towing service.

5. Towage on any particular trip to be at discretion of Master, and your check in above amounts to be delivered our representative at Galveston or New Orleans, immediately steamer has barge in tow.

6. No freight of any description to be loaded on these barges, including small boats or other floating equipment, without specific authority from this office, and should such authority be granted, additional charges will be made for shipments or equipment so carried.

183 I note that three of these barges are expected in New Orleans at this time, and I would suggest your representative confer with Mr. Lamberton as

to details for towing, as I am sending him copy of your letter and my reply. You should get in touch with Mr. Wilkins and keep him advised concerning proposed towage of barges from Galveston.

I do not consider it the safest thing in the world to tow these barges during the prevalence of Northers in the Gulf, and handling on any particular trip must be left to the discretion of the Master.

You will note I have also stipulated that barges moving via New Orleans must be delivered to ship outside the bar, as I would not consider towing these barges down the river with our ships.

Please acknowledge receipt of this letter, and advise if proposition is acceptable.

Yours truly,

(Sgd.) C. W. JUNGEN.

184 LIBELANT'S EX. 7.

(Letterhead of Southern Pacific Company, Atlantic Steamship Lines.)

New York, Dec. 28, 1920.

Subject: Towing of Oil Barges.

Mr. C. A. Barbour,
602 First National Bank Bldg.,
Houston, Texas.

Dear Sir:

Acknowledging your letter of December 24th., and referring to our agreement of April 1, 1920, covering towage of six oil barges from Galveston to Tampico for your account, for the sum of $1,500.00 each:

I note you expect to have the last two barges ready to tow South about January 5th, and that each will have small barge on deck, one a water barge and the other for freight.

At the discretion of the Master we will accept these barges so loaded, for which an extra charge of $250.00 each will be made, in addition to the agreed rate of $1500.00 each for towing the large barges, and I am sending copy of this letter to Mr. Wilkins as his authority for handling.

It is understood, of course, that all provisions of the original agreement will apply and that this company will assume no risks whatsoever in connection with the tow.

Yours truly,

(Sgd.) C. W. JUNGEN.

185 LIBELANT EX. 8.

Libelant's Exhibit No. 8—Survey Report of James F. Taylor, May 10, 1922—omitted, being heretofore copied at page 75.

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186 LIBELANT'S EX. 9—SURVEY ON SHIP.

Nov. 14 22.

I, Verne Dyer, Marine Surveyor, certify that at the request of Jesse Barbour, Owner's Agent of the Mex. Tug "Wash Gray" and William J. Pulford, Underwriters Agent at Tampico Mexico, I surveyed that vessel on the 10th day of May, 1922—4-20 P. M. Last, in consequence of her having been prepared to be towed to Galveston or other Texas Port.

On examination of this vessel on the day named I found: all deck openings have been tightly closed and properly battened; all window openings in the house structure have been boarded up; a 600 lb. anchor with 60 fath. of 6½" hawser has been provided; three 2" syphons and two 6" x 4" x 6" steam pumps are installed for caring for any emergency; steam will be carried throughout the voyage. A Master, Engineer and two Firemen will be aboard during the voyage. Proper lifeboat, life preservers and full complement of lights are carried.

In my opinion this vessel is in first class condition to be towed to any Texas Port during the next sixty days.

From the survey that I have been able to make, has far possible, I conscientiously believe the said vessel can proceed on her voyage towed to any Texas Port.

Given &c.

(Sgd.) VERNE DYER,
Surveyor to Underwriter's Agent.

Received for this survey and report two visits and all expenses—$50.00 Mexican Gold.

(To be appended to the Report of a Surveyor employed by Underwriter's Agent.)

I, William J. Pulford, Underwriter's Agent certify that Verne Dyer, Marine Surveyor, has been employed by Jesse Barbour, Owner's Agent of the Mex. Tug "Wash Gray" and myself to survey that vessel, and I believe confidence may be placed in this certificate.

(Sgd.) WM. J. PULFORD.

Received Agent's Fee for this Certificate—$20.00 Mex. Gold.

(Stamp): The Board of Underwriters of New York.

W. J. Pulford, Correspondent, Tampico, Mex.

188 LIBELANT'S EXHIBIT NO. 2, BEING TUG BOAT TARIFF FOR HOUSTON SHIP CHANNEL.

Tug Boat Tariff for Houston Ship Channel.
Effective August 1, 1922.

Buffalo Bayou Company,
(Incorporated.)

General Harbor and Coastwise Towing,
Lightering and Coastwise Oil,
Towing a Specialty.
Prompt Service.

Phone Preston 475. No. 1 Fannin Street.
Houston, Texas.
P. O. Box 590.

Tugs:
Centurion: Edmond Browne: Arlett "A": Helen Henderson: Ellis: Orion: Neches.

Tug Boat Tariff for Houston Ship Channel,
Effective August 1, 1922.

Assisting Steamers.

Galveston to Houston	$325.00
Texas City to Houston	325.00
Galveston to Baytown	275.00
Texas City to Baytown	275.00
Galveston to Lynchburg	275.00
Texas City to Lynchburg	275.00
Bolivar Roads to Houston	285.00
Bolivar Roads to Baytown	235.00

Bolivar Roads to Lynchburg	235.00
Morgan's Point to Houston	200.00
Houston to Sinco, Texas Co. dock, Crown Oil Co. and Galena points	75.00
Houston to Lynchburg	165.00
Houston to Baytown	175.00
Houston to Morgans Point	200.00

189 The above prices are for one tug only and cover the assistance of steamers using their own wheel power. Dead steamers are to take a special rate to be agreed upon at time of movement. Charges include docking and undocking.

Voyage must be completed on day of starting. In event voyage is not completed on day of starting an additional charge of $75.00 per tug will be made.

Miscellaneous Services.

Docking or undocking at Turning Basin, Houston	$40.00
Docking or undocking at Manchester, Sinco, Texas Co. dock, Crown Oil Co. Dock, Galena or other points	50.00
Shifting from dock to dock at Turning Basin:—	
Ships with wheel power	40.00
Ships without wheel power	55.00
Houston to Manchaster:—	
Ships with wheel power	50.00
Ships without wheel power	65.00
Shifting from one point to another on same dock at Manchester, Sinco Tex. Co. dock, Crown Oil Co. dock, Galena or other points:—	
Ships with wheel power	50.00
Ships without wheel power	65.00

Shifting from one dock to another at other points than at Turning Basin (Manchester to Sinco Galena to Sinco, Texas Co., dock to Manchaster, etc.):—

Ships with wheel power	60.00
Ships without wheel power	75.00

Special Services.

Ships going aground will be given one hour free pulling time. For the first hour thereafter, or fraction of an hour, a charge of $25.00 per tug will be made, and $20.00 per tug per hour or fraction of an hour after the first hour.

If tug is ordered on job and not previously engaged a charge of $40.00 for the first hour and $20.00 for each succeeding hour, or fraction thereof, will be made. Time to be computed from the time tug leaves her berth until she returns to her berth.

Ship to Furnish Hawsers.

If tug is ordered on job at other ports than on Houston Ship Channel then the rates prevailing at such points for such service will be made. This provision, however, will not apply when tug is ordered to assist vessel which is being assisted on a through voyage by one of our own tugs, in such event, the above rates will apply.

If tug is ordered to lay by and not put to work, lay time to be per hour or any fraction of an hour, $15.00 per tug.

Furnishing steam, per hour or fraction of an hour, $20.00 per tug.

Sailing Vessels.

Galveston Bar to Houston and Return, 65 cents per gross registered ton, round trip.

Minimum charge, $500.00.

Notice!

Notice is hereby given to vessels their owners and charterers that neither

Buffalo Bayon Co., Inc.,

nor any of its tugs will be responsible for damages suffered by vessels or caused by them, while in tow of their tug or tugs; that all towing will be done only at the risk of the tow, and neither the company nor its tugs so employed will be responsible for any damage done to the tow through negligence; and that the Masters and crews of the tugs performing the towage service will be declared the servant of and identified with the vessel or craft towed.

190 DEPOSITIONS OF A. N. PECKHAM, L. MIMS AND CHARLES DROUET, WITNESSES ON BEHALF OF LIBELANT, TAKEN BEFORE C. R. TRIAY, NOTARY PUBLIC, HARRIS COUNTY, TEXAS, AT HOUSTON, TEXAS, AND EXHIBIT.

Filed May 31st, 1926.

(Titles Omitted.)

191 Stipulation.

The Compania de Navegacion, Interior, S. A. No. 17209.

It is agreed by and between both parties hereto, represented by their counsel, that the testimony taken shall

apply with full force and effect in each and every one of the above entitled and numbered causes, as if taken in each particular case. It is agreed that the testimony shall be taken down in shorthand by C. R. Triay, who is a notary public in and for Harris County, Texas, and serving in such capacity in this cause; and that the signing, sealing and certification of the depositions are waived; that a carbon copy shall be made for counsel for respondent, to be taxed along with the originals as part of the cost of Court:

Appearances:

For Libelant, Messrs. John D. & M. A. Grace, by Hon. John D. Grace.

For Respondents, Messrs. Dart, Kernan & Dart, by Hon. Henry B. Dart, Jr.; Messrs Andrews, Streetman, Logue & Mobley, by Robert H. Kelley, Proctors for Respondent.

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Depositions and answers of the witnesses A. N. Peckham, L. Mims, and Charles Drouet, witnesses in behalf of Libelant, taken in accordance with the accompanying notice, before C. R. Triay, a notary public in and for Harris County, Texas, on the 14th day of June, A. D. 1923, at the office of C. A. Barbour, 6th Floor, First National Bank Building, Houston, Texas (Harris County, Texas). And the said A. N. PECKHAM, being duly sworn, testified as follows:

Direct Interrogatories.

Questions by Mr. Grace:

Q. Mr. Peckham, where do you reside?

A. Port Arthur, Texas.

Q. What is your line of business?

A. Marine contracting, tug-boat work, lighterage.

Q. In speaking of tug-boat work, lighterage, marine contracting, what character of business is that? Give us a little more in detail.

A. In the contracting, practically all things on salt water, or the navigable streams, except hydraulic dredging, jettying and breakwater and wharf work, and stuff like that; and tow-boating, the employment of tugs in our own work, and the towing for others, where we can secure one, lightering a cargo, bulk, dry cargo, on lighters, derrick barge work, and such stuff as that.

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Q. With respect to the towage services, between what ports and places do you operate?

A. We have made tows between practically all the Gulf ports, between one and the other, and around in Cuba, in some cases, the South Atlantic, Jacksonville.

Q. Then you operate ocean-going tow-boats?

A. Yes, sir, that is coastwise towing.

Q. Sometimes between American and Mexican ports, and Cuban ports?

A. Yes, we have not towed to Mexico for years.

Q. But with respect to coastwise generally, between Gulf ports and South Atlantic ports?

A. Frequently the Gulf ports.

Q. Still engaged in that business?

A. Yes, whenever we can find one.

Q. How long have you been engaged in that line of business?

A. About twenty years.

Q. Operating tow-boats between Gulf ports?

A. Yes, sir.

Q. When you are called upon for the purpose of securing one of your tow-boats to handle the tow, tug

or barge, or something of that kind, or ship, under what terms and conditions do you make such contracts?

Mr. Dart:

We object to that evidence on the ground that it is irrelevant and immaterial and incompetent, and we move to strike out all testimony of the witness given
194 in response to the question.

A. Well, usually we employ the tug by the day, or if we cannot do that, by the lump sum for the tow, and in all instances, it is required that the tug, or its owners, shall be exempt from any liability of the tow.

Q. How long has that been your practice, to insist upon those terms and conditions in your contracts?

Mr. Kelly:

May it be understood that the same objection will go to all testimony along the same line, without renewing it each time.

Mr. Grace:

Yes.

A. During all my experience.

Q. Covering how many years?

A. About twenty years.

Q. From what port or ports do you operate, Mr. Peckham, your tow-boats?

A. At present, you mean?

Q. Yes.

A. We are operating out of Port Arthur today, and have for the last several years.

Q. What other ports have you operated out of?

A. You mean made tows out of other ports?

Q. Yes.

A. Or continuous operations?

Q. No, just taking business generally at the other ports.

195 A. Well, we have made tows out of Gulf ports, and made them out of Mobile, and made them out of New Orleans and Aransas. We have made tows from there, and Corpus Christi.

Q. How about Galveston?

A. And Galveston, of course, and tows out of Houston. We towed out of New Orleans to Cuba. Then to Tampa from Port Arthur or Galveston.

Q. In speaking of Port Arthur, you refer to Port Arthur, Texas?

A. Yes.

Q. Are you familiar with the nature of contracts made by other contracting concerns operating tow-boats in the general towage business?

A. Yes, I have hired tows made, or on account of other concerns.

Q. And that has been during how long a period of time?

A. Oh, perhaps the same period.

Q. About twenty years?

A. About twenty years, yes.

Q. And during all of those times, and down to the present time, what have you to say with respect to conditions that may be required by other towing concerns?

A. They were all practically the same.

Q. In what respect?

A. Well, they would hire us the tug only in the event that they were relieved of any liability for the tow.

Q. Do you know the D. W. Ryan Towboat

196 Company?

A. Yes, sir.

Q. They operate where?

A. At present, out of Houston. That's their headquarters, I believe; formerly out of Port Arthur, Texas.

Q. Do they do Gulf towing?

A. Yes, sir.

Q. Do you know how long they have been engaged in Gulf towing?

A. Why, I don't know the number of years, eight or ten years, something like that.

Q. I show you a piece of stationery here, of the D. W. Ryan Towboat Company, and call your attention to some figures set out in small print at the very bottom of the letterhead itself; there's an arrow directed to it, with the marking "Please Note"; and I ask you to state whether or not you have seen terms and conditions of the same kind and character required by other concerns for Gulf towage.

Mr. Dart:

We object to the question and to the document exhibited to the witness, on the ground that it is irrelevant, incompetent and immaterial, that it is not supported by any issue involved in this case, in the pleadings or otherwise, and not the best evidence, and move to strike out and suppress the evidence just offered, as well as the answer of the witness. Now, shall we agree that the same objection shall apply to all the evidence along the same line, without the necessity of renewing the
197 same and the same motion having been made?

Mr. Grace:

The same objection in all its terms is considered to apply.

Mr. Kelley:

You might also add to the ground of objection that it is hearsay.

A. Yes.

Q. State whether or not it is or is not in line with the general requirements of tow-boat owners operating out of all of the different Gulf ports, so far as your experience has gone, these number of years.

Mr. Kelley:

We make the further objection that the witness is not shown to be qualified to answer it, and further, there is not shown to be any general custom in this respect, and on those grounds we ask leave to strike out and suppress any answer which may be given in response to the question.

A. Yes, it is.

Q. In the business of your own company, does that condition which is set out on the D. W. Ryan stationery represent substantially the terms and conditions that you insist upon in your operation?

A. Yes, sir, we carry the same thing on our bill head. There is practically the same contract or clause in any contract for outside towage.

Q. And where you have engaged towboats for towage services from other operators of tow-boats,
198 operating in the Gulf, state whether or not they have or have not required conditions substantially identical with those on the D. W. Ryan Towboat Company's stationery.

A. They have required it.

Q. Is that universal in the Gulf?

A. As far as I know, yes. As far as our experience goes.

Q. Do you handle foreign ships with respect to towage services for them in the harbor work?

A. Yes, sir.

Q. Have any complaints been made by any of those foreign ships with regard to the provisions or the terms and conditions, such as is shown, substantially of the nature as set out on the D. W. Ryan Towboat Company's stationery?

A. There was some few years ago, an objection raised to it.

Q. By ships of what nationality?

A. British ships, British owners.

Q. What was the nature of the objection urged by them a couple of years ago?

A. They thought we ought to leave it off, until I showed them that some of the British towage companies had as we construed it a much stronger clause than that in their contracts.

Q. A much stronger clause with respect to what?

A. Limiting the liability.

199 Mr. Kelley:

We move to strike out the answer of the witness on the ground that it is not responsive, and on the ground that it involves matters of hearsay, and matters with which parties to this litigation have no concern, and it is irrelevant, immaterial, and incompetent.

Q. And when you showed to them the contracts insisted upon by British tow-boats in English waters containing a clause, you say, which limits liability to a greater extent than this one on the D. W. Ryan Tow Boat Company's, what was the action then of the English ship-owners?

Mr. Kelley:

The same objection and the same motion.

A. They ceased to object to it.

Q. Under the circumstances, they accepted your form of contract?

A. Yes, surely.

Mr. Grace:

This piece of stationery that has been referred to in the exainmation of this witness is offered in evidence, and marked

"LIBELANT'S EXHIBIT L-1."

Mr. Dart:

We object to the offer, and move to strike out the exhibit on the grounds heretofore urged.

(By agreement of counsel, the exhibit referred to was here read into the record.)

Tugs—Orion, Neches, Mary B. Curtis, Ellis, Centurion, Helen Henderson.

To D. W. Ryan Tow Boat Company, Dr.

200 General Towing.

Room 7 Merchants State Bank Building.
Phone 749; Post Office Box 927.

Notice is hereby given to vessels, their owners and charterers that neither D. W. Ryan Tow Boat Co., nor any of its tugs will be responsible for damages suffered by vessels or caused by them, while being assisted by their tug or tugs, that all tug services will be done only at the risk of the vessel being served, and neither the

Company nor its tugs so employed will be responsible for any damage done to or by the vessel served through negligence; and that the masters and crews of the tugs performing the service will be deemed the servants of and identified with the vessel or craft being served.

Cross Interrogatories.

Questions by Mr. Dart:

Q. Where do you reside, Mr. Peckham?

A. Port Arthur, Texas.

Q. Under what name are you engaged in business?

A. The firm name of D. M. Picton & Company.

Q. D. M. Picton & Company?

A. Yes, sir.

Q. What is that, a corporation?

A. It has been incorporated this week; prior to that, it was a co-partnership.

201 Q. Are you one of the incorporators?

A. Yes, sir.

Q. A former partner, also?

A. Yes.

Q. In what business are they engaged?

A. Well, the same line of business, towing, contracting, tow-boating, lightering, barge work, and such as that.

Q. Prior to being associated with D. M. Picton & Company, what firm were you connected with?

A. I was connected with the firm of Charles Clark & Co., of Galveston, Texas.

Q. And when did you cease your connection with Charles Clark & Company?

A. I think 1908 or '09.

Q. Were you an employee of that firm, or associated in business with them?

A. I was a member of the firm.

Q. And how long were you a member of the firm?

A. Well, off-hand, I don't remember. My first employment with them, I think, was in 1901 as an employee, and I think it was in 1904, possibly, or '05, I became a member of the firm.

Q. And before becoming associated with Charles Clark & Company, what firm were you associated with?

A. Well, I was in Michigan. No, I will correct that, prior to going with Charles Clark & Company,
202 I was with the Beaumont Irrigating Company in Beaumont, Texas, which is a rice plantation company. I will correct that again. I was first with Charles Clark & Company, and then went with the Beaumont Irrigating Company, and then went back with Charles Clark & Company.

Q. When did you first come down to Texas?

A. I think it was in '99—yes, the latter part—when was the flood, or storm? Nineteen hundred?

Mr. Kelley:

Yes, 1900.

A. Well, it was right after that.

Q. You are a native of Michigan?

A. I was born in Canada; my home state is Michigan.

Q. And you came down to Texas?

A. Yes.

Q. In 1900?

A. Yes; identify it from the storm. It was right after the Galveston storm.

Mr. Kelley:

The storm was September 8, 1900.

The Witness:

(Continuing): Yes, 1900, I know that was it.

Q. Did you go into the marine contracting and tow-boat business when you first came down there?

A. No, I did not do anything for a while. Then I went with Charles Clark & Company over at Beaumont, in the oil business, and things like that.

Q. They are engaged in the business of towing oil barges, are they?

203 A. They are engaged in contracting, and they were at that time, and still are.

Q. You left at that time, and went into the Beaumont Irrigation Company?

A. That's it.

Q. That is the company that supplied water for irrigating rice farms?

A. Yes, owned the lands, some of the lands, and supplied the water.

Q. Then you went back with the Clark firm?

A. Yes, sir.

Q. And after that you joined the Picton firm?

A. Yes, the Picton firm was organized when I went into it.

Q. Now, does your firm own any tug-boats?

A. Yes, sir.

Q. Did I understand you to testify that the custom that you referred to was the universal custom prevailing with tow-boat companies on the Gulf Coast?

A. Yes, that is my experience, yes, sir.

Q. Well now, you have been directly connected with two tow-boat companies?

A. Yes, sir.

Q. That is to say, the Charles Clark Company and the D. M. Picton Company?

A. Yes, sir.

Q. Am I correct in understanding that the
204 custom that you have referred to has been followed by D. M. Picton & Co. and Charles Clark & Co. universally?

A. It was by Charles Clark & Company while I was with them, and I understand so since. They have made some tows for us in which they made that requirement, and we have.

Q. Well, do you mean that the firm of Charles Clark & Co. has never accepted a tow unless the owner of the tow released them from all liability from loss, no matter how caused?

A. I have not seen all the contracts since I have been away from them, but that is the contract I have seen with them when they have towed boats of ours.

Q. Well, during the period that you were connected with them, from 1905 to 1908, do you mean to say that the Clark firm never accepted a tow without a waiver of liability?

A. I don't believe they ever did.

Q. Well, that is merely your belief?

A. That is the best of my knowledge, yes, and recollection.

Q. Do you mean to say that no other towboat company operating on the Texas coast has never accepted a tow without a waiver of liability?

A. Oh, I could not say that, but I know that that is the general custom from what these other tow-boat people or companies told me, and the contracts that we have signed, where other tow-boat companies have made tows for us, and such contracts as I have seen,
205 made by the tow-boat companies for different tows, and our own.

Q. Well, after all, Mr. Peckham, that is a matter of contract between the parties, isn't it?

A. I presume probably so.

Q. All you mean to say is, that so far as you know, it is customary for the tow-boat companies to require the owners to consent to such a stipulation?

A. Yes, sir.

Q. Don't you make a great many tows in and out of the harbor without any written contract at all?

A. How do you mean? In and out of the harbors from one port to another port?

Q. Yes.

A. No, we always have a contract, always have an understanding.

Q. Well, I mean a written contract. You always have a written contract?

A. No, sometimes on a hurry-up job we have made a verbal contract.

Q. Well, isn't it frequently your custom or habit to tow vessels without any contract at all, either verbal or written?

A. No, sir.

Q. Don't you tow a vessel merely on a telephone call, very often?

A. Yes, but that would be a verbal con-
206 tract; not frequently that way. The negotiations are probably made that way.

Q. Doesn't it frequently happen that you tow a vessel in the harbor, without any previons agreement at all?

A. Inside work, you mean? Harbor work?

Q. Yes, harbor work.

A. Yes, we consider that as covered by our harbor tariff, which carries that clause.

Q. It does? Have you a copy of that tariff with you?

A. No, I have not. It is covered in that tariff.

Q. You mean there is a clause in the tariff?

A. Yes, sir.

Q. Written clause in the tariff.

A. Yes, printed.

Q. Is that tariff filed with the Texas Railroad Commission?

A. Oh, no.

Q. Or any other governmental body?

A. No, it is simply filed in every shipping office that we have knowledge of.

Q. Then you mean that that tariff is a sort of a notice to the people that you do business with that you will accept their business on those conditions?

A. They accept our tugs on those conditions.

Q. For harbor work?

A. Yes, sir.

Q. But there is no publication of it with any harbor body?

207 A. It is in the Shipping Board.

Q. You mean in Washington, D. C.

A. Yes, and I guess in every shipping board office on the coast, as well as Washington, D. C.

Q. Do you know Mr. Barbour?

A. Yes, sir.

Q. What are your relations with him?

A. Very friendly for some years.

Q. Do you do business with him?

A. Not to any extent; only occasionally.

Q. Well, do you do business to any extent?

A. Oh, I have done some towage for him.

Q. You know nothing about this case, I presume?

A. Only in a general way. I never saw the boat; don't know any of the particulars.

Re-Direct Interrogatories.

Questions by Mr. Grace:

Q. With respect to that stipulation which is insisted upon in your various contracts, is that insisted upon without regard to what amount may be paid for the towage services?

A. Yes, sir.

Q. If a higher amount was paid for the towage services, would you eliminate that condition?

A. No, I would not.

Q. You know of any others that would eliminate it?

A. No, I don't.

Q. You spoke of a tariff filed by your com-
208 pany, and that in that tariff was the condition that you speak of, similar to the one we have been referring to on the Ryan Tow Boat Stationery. I show you a tug-boat tariff of the Houston Ship Channel, and I ask you if the tariff of your company is gotten up in similar form to this one headed "Tug Boat Tariff for Houston Ship Channel, by the Buffalo Bayou Company, Incorporated;" on page 4 is a clause similar to the clause on the Ryan Tow Boat stationery, Libelant's exhibit 1.

A. Yes, we carry that clause in our tariff.

Q. That is the harbor tariff that you speak of?

A. Yes, sir.

Q. And a copy of your tariff has been of record with the Shipping Board, and in the various Shipping Board Gulf offices?

A. Just as many as we can find. We mailed out five or six hundred of them.

Mr. Grace:

This particular tariff of the Buffalo Bayou Company, Incorporated, is marked for identification "Libelant's Exhibit 2."

Mr. Dart:

You have not offered the exhibit yet?

Mr. Grace:

No.

210 L. MIMS, having been duly sworn, testified as follows:

Direct Interrogatories.

Questions by Mr. Grace:

Q. Mr. Mims, what is your present occupation?

A. Assistant general manager, Freeport Sulphur Company.

Q. Where do you reside?

A. Freeport, Texas.

Q. Where does that business require you to stay, principally?

A. At Freeport.

Q. In your position and connection with that company, what are your duties, in a general way?

A. To supervise the transportation, handle transportation matters, coast, marine, and rail.

Q. What business, particularly, is the Freeport Sulphur Company engaged in with respect to the maritime enterprise?

A. Transporting oil between Tampico and Freeport and sulphur between Freeport and the Atlantic Seaboard, and foreign countries.

Q. In the conduct of that business, are you called on frequently to enter into towage contracts where your company undertakes towage service for outside parties, and where your company seeks towage services from outside parties?

A. Occasionally, not frequently.

Q. How many ocean going vessels do you operate?

A. Six; two tankers, one cargo carrier, one
211 tug, and two barges.

Q. How long have you been engaged in that business, Mr. Mims?

A. About six years.

Q. During the month of May, 1922, did you, as the officer for the Freeport Sulphur Company you mention, enter into a contract for the towage of the tug Wash Gray, from Tampico, Mexico, to Freeport, Texas, United States?

A. I did.

Q. Have you a copy of that contract with you?

A. Yes, sir.

Q. Will you kindly produce it, Mr. Mims?

(Witness produced the contract, and it was read into the record by agreement of counsel, and is as follows:

Letter, L. Mims to Capt. C. A. Barbour, May 18, 1922, omitted, being heretofore copied at page 78.

* * * * * * * *

Q. That represents the contract, then, that was entered into, and under which your company undertook to tow the Wash Gray from Tampico to Freeport, Texas?

A. Yes, sir.

Q. What ship, was it, Captain, that undertook that service?

A. The S. S. Freeport Sulphur, No. 1.

Q. That vessel belonged to your Company?

A. Yes, sir, the Freeport Sulphur Trans-
213 portation Company, which is an affiliated company.

Q. The operation of the vessel being under your control?

A. Yes, sir.

Q. That form of contract which you have read there, is that the usual or an unusual form of contract, with respect to the terms there, concerning the question of the service being rendered at the risk of the tow?

Mr. Kelly:

We object, because the witness is not shown to be qualified to answer the question.

A. The provisions are the usual provisions which obtain in the Gulf of Mexico. I am not prepared to say as to form, because—

Q. (Interrupting.) In other words, the identical wording may be different, but the meaning between the parties is the same?

A. Yes, the meaning is the same.

Q. If the owners of the tug Wash Gray had offered you a higher towage price, would you have omitted those conditions in there that the service would be at the risk of the tug itself, the tow?

A. No, sir.

Q. So that the terms and conditions of the contract would be the same, without regard to the question of the amount paid?

A. The terms would have been the same.

Q. With respect to the time within which
214 the voyage was made, or speed at which the tug should be towed, was there any binding agreement between yourself and the owners of the Wash Gray on that?

A. No, sir.

Q. In setting out, in the first paragraph of the contract, that the services were to be performed on the next

voyage of the Freeport Sulphur No. 1, which you say in the letter you anticipate will leave Freeport June 1st, sailing from Tampico on the afternoon of June 3rd, arriving at Freeport on the morning of June 5th, was there any understanding or agreement that the services had to be entered upon and concluded within that time?

A. No, sir.

Mr. Kelley:

We object to that on the ground that it is an attempt to vary, contradict and modify and otherwise change the written agreement between the parties, and move to strike out any evidence given in answer to this question.

Mr. Grace:

The questions are not propounded for the purpose of attempting any change in the contract; just simply denying that there is anything in the contract justifying the assertions set up by the respondents in their pleadings.

Q. What was the purpose and object, Mr. Mims, in mentioning these particular dates?

Mr. Dart:

Let's agree that the same objections shall apply to all this line of questions, without the necessity
215 of renewing the same.

Mr. Grace:

Yes, sir.

A. To give Captain Barbour the approximate time of departure and time of arrival at Freeport, so that the

tug might be ready for towing, and in order that he might have a tug on hand at Freeport to pick the vessel up outside the bar.

Q. With respect to the speed at which the tug would be towed, what were the prevailing conditions? Who would determine that?

A. I don't know that there was any question about that at all.

Q. That part was never discussed between you?

A. Never discussed between us.

Q. So that whether the tug would go at four or five knots or go at a higher rate of speed, that was left in the discretion of whom?

A. Left at the discretion of the master of the towing vessel, and I assume the master of the tug, too, if they were going too fast—of course, it depended a good deal on the weather. It was left to the discretion of the master of the towing vessel, and the master of the vessel that was being towed.

Q. Was there any direction given by you to the master of the Freeport Sulphur No. 1 with respect to what time he should make in handling this tug?

A. None whatever.

Q. Was there anything at all said by you to
216 Captain Barbour or anybody else represented or interested in the ownership of the Wash Gray concerning what speed the tug would be towed at?

A. No, sir.

Q. During these four or five years in which you have occupied the position you mention, have you had occasion to enter into towage contracts at different places for the towage of vessels on the Gulf?

A. Yes, sir.

Q. In all of these contracts, were you, on behalf of your company, or your company, has undertaken to per-

form the towage service, and in those contracts where outside parties have undertaken to perform the services, for you or your company, what have you to say with respect to the conditions about at whose responsibility the towage services would be performed?

A. The towing of the vessel is always at the risk, I mean the vessel being towed is always at the vessel's risk.

Mr. Dart:

Just at this point, let me interrupt you a moment. We want to make the same objection we made to the questions asked the previous witness on this subject, on the ground that the evidence is irrelevant, immaterial, and incompetent, hearsay, and move to strike out any evidence given in answer to this and other questions, with the understanding that the same objection shall be understood as having been urged to all the testi-
217 mony along the same lines.

Mr. Kelly:

And on the further ground that the actions or contracts of the Freeport Sulphur Company are peculiarly irrelevant, because that is not a company engaged in the towing business.

Q. So that in all of those cases, where your company has undertaken the towage service, and in all of those cases where other parties, in other Gulf ports, have undertaken a towage service for your company, the towage service has always been performed at the risk of the vessel that was being towed?

A. Yes, we have towed several barges and tow-boats, the service being performed at the risk of the vessel being towed in every case. We have chartered tugs on several occasions to tow barges in our service, and in every

instance, the risk has been on the vessel that is being towed. In other words, no liability has been transferred from the vessel being towed to the vessel performing the towing service.

Q. And those character of contracts which you speak of, that have been made by your company, as the party undertaking to perform the service, as well as those contracts made by other parties, undertaking to perform a towage service for your company, have been made with respect to towage services on the Gulf of Mexico during what period of time?

218 A. During the last five years.

Cross Interrogatories.

Questions by Mr. Kelly:

Q. The Freeport Sulphur Company, Mr. Mims, is not in the general towing business, is it?

A. No, sir.

Q. Such towage services as it has performed for others have been merely incidental to its other business, and either for the purpose of accommodating others, or for the purpose of picking up incidental profit?

A. That is correct.

Q. Your business is the mining of sulphur, and the selling of it, and in connection with that, the transportation of fuel oil from Mexico to your plant at Freeport, isn't that right?

A. Yes, sir.

Q. How many times a year, on an average, do you estimate that the Freeport Sulphur Company has employed outside concerns to do any towing work for it?

A. That employment depends upon conditions at Freeport. In the year 1920, we employed an outside towboat on several different occasions. In the year 1921,

I don't recall a single use—I don't think we used an outside tow-boat at all. During the year 1922, we employed an outside tow-boat for probably three or four times, for trips from Freeport to Galveston.

219 Q. Was that the same outside boat that you employed in each instance, or were they different boats?

A. Different.

Q. Were they hired, or chartered by the tow or by the trip or in both ways?

A. Both.

Q. How many concerns, Mr. Mims, did you deal with in employing these tugs in 1920 and 1922, to perform this towage service that you speak of?

A. My recollection is that we secured bids in cases where we asked for bids on a lump sum basis, on a job, we secured bids from four or five different concerns.

Q. There are a good many concerns engaged in the towing business along the Gulf, aren't there?

A. Oh, yes.

Q. In fact, a great many of them?

A. A great many.

Q. There is at least one in practically every port of importance along the Gulf, isn't there?

A. Yes, sir.

Q. Now, in your conversation with Captain Barbour, with respect to the service that your vessel was to perform for his tug, the Wash Gray, didn't you mention to him the regular schedule of your boat, or about the length of time that she ordinarily required to go back and forth between Freeport and Tampico, or

220 was this letter of yours the first time that you mentioned it?

A. I don't recall the conversations preceding the letter. It is very likely that the schedule was mentioned, or the same time was mentioned.

Q. In writing your letter, you anticipated, did you, that the Freeport Sulphur No. 1 would make about the same time with the tug in tow that she did otherwise?

A. Yes, sir.

Q. Was this towage service ever paid for? This amount of $1,200.00 that is mentioned in the letter?

A. Yes, sir, it was paid.

Q. How many hours does that Freeport Sulphur No. 1 usually take to make the run between Tampico and Freeport?

A. The average is about 40 hours.

Q. Does it make about the same time loaded and empty?

A. Well, with weather conditions the same, it makes a little better time Southbound, empty.

Q. Of course, the time will vary, dependent on weather conditions and the condition of the sea?

A. Oh, yes.

Q. And the wind, and so on. But the average time, particularly in the Summer, would make the run in about 40 hours?

A. Yes, sir.

Q. Her usual schedule is to leave Tampico in the late afternoon and get into Freeport about daylight the second morning?

221 A. Well, all the way from daylight until noon. I would say the average to be about nine o'clock in the morning.

Q. Do you know her usual rate of speed loaded?

A. Yes, ten to ten and a half knots.

Q. Ten to ten and a half. Does the master of that vessel make out his log in duplicate and send a copy of it to your office?

A. Yes, sir.

Q. Do you have in your office one of the copies of the log of the Freeport Sulphur No. 1 for that trip, haven't you?

A. Yes, sir.

Q. You haven't got it with you?

A. I may have a copy with me in this file.

Q. I wish you would look and see.

A. Yes, sir, I have an extra copy of the log for that voyage.

Q. You say this is the signature of the master?

A. Yes, sir.

Mr. Grace:

All testimony of any nature whatsoever with respect to what purports to be a copy of the log of the ship, or any entries with respect to those made in the log of the Steamship Freeport Sulphur No. 1 are objected to as wholly irrelevant, immaterial and incompetent, and inadmissible; and it is agreed between counsel on both sides that this exception shall stand to all questions propounded with respect to the alleged copy, or the original, if the original shall be produced, without the necessity of repeating this exception. That the said document is a self-serving document, and the entries purporting to have been made are signed by persons not called or sworn as a witness in this case, and for that reason also objected to as irrelevant, immaterial, incompetent, and inadmissible.

Q. Is it a part of the custom of your concern for the master to deliver copies of his logs into your office?

Mr. Grace:

Objected to on the grounds that it is immaterial, irrelevant, and incompetent.

Q. I understood you to say that it was made by him in duplicate?

A. All unusual incidents, particularly those involving a stranding, collision, or accident of any nature, abstracts of the log are furnished immediately following such occurrences.

Q. This document, then, that you have produced, came into your office in the regular course of your company's business?

A. Yes.

Mr. Grace:

Objected to on the further grounds that it is irrelevant, immaterial, incompetent, inadmissible, and that the company referred to is not a party to this case.

Mr. Kelley:

We offer in evidence, and ask to have marked "Respondent's Exhibit No. 1," consisting of four sheets, the document produced and referred to by the witness.

223

Mr. Grace:

The offer is objected to on the ground that the document itself purports to be nothing more than a copy from a log. That for that reason it is objected to as not being the best evidence. Secondly, it is purely hearsay entries, made by a party not called and examined in this cause. Objected to on the ground that the entries therein made are not made under sanction of an oath. Objected to further on the ground that the log itself, if produced, is not admissible, for the reason that it is a self-serving declaration, and in so far as the parties are concerned in this case, is irrelevant, immaterial, incompetent, and inadmissible.

Re-Direct Interrogatories.

Questions by Mr. Grace:

Q. Mr. Mims, of your own personal knowledge, you don't know anything about any of the facts that actually occurred on the Freeport Sulphur, or occurred on the Wash Gray?

A. I do not.

Q. Your knowledge with respect to anything at all concerning what happened out at sea, whether the vessel was lost or not lost, that is, the Wash Gray, was purely upon hearsay reports to your office?

A. Yes, sir.

225 CHARLES DROUET, having been duly sworn, testified as follows:

Direct Interrogatories.

Questions by Mr. Grace:

Q. Captain, where do you reside?

A. Houston, Texas.

Q. What is your occupation?

A. Well, I am president and manager and director of the D. W. Ryan Tow Boat Company.

Q. Is that company in any way identified with the Buffalo Bayou Company, Incorporated?

A. Why, it is owned by the same man. D. W. Ryan owned both companies. They were separate companies, incorporated companies.

Q. How long have you been identified with the tow-boat business in an administrative capacity?

A. Oh, the past fifteen years.

Q. That is, making contracts?

A. Yes, sir.

Q. And attending to things of that sort. And operating, Captain, in and out of what ports?

A. Houston and Galveston.

A. No, I never have been in an executive position in any other port. Of course, I have been in and out of all the ports.

Q. In your fifteen years' business, has that carried you in and out of all the various Gulf Ports?

226 A. Why, practically, yes.

Q. And that line of business, towing business, which is carrying you in and out of practically all of the Gulf ports, has been for a period of about how long?

A. About fifteen years.

Q. I show you here a folder, a cardboard, covering four pages of print, marked for identification heretofore "Libelant's Exhibit No. 2," and ask you if that refers to the Buffalo Bayou Company, Incorporated, in which your principals are the owners of the stock?

A. Yes, sir.

Q. I show you particularly page 4, on which a notice is printed, on page 4, and ask you to read that over, and state whether or not the conditions stated in that notice are conditions which are always embodied in your contract for towage.

Mr. Dart:

Now, we object to that question and all evidence along the same line, on the ground that it is irrelevant, incompetent, and immaterial, and not the best evidence, hearsay, and leading and suggestive, and move to strike out the answer to the question and all other answers to similar questions without the necessity of renewing the motion.

Q. What is your answer, Captain?

A. Yes, sir.

227 Q. When your contract is made, is there a different rate charged, or would a different rate be charged, or rather, would you omit the question of liability or agreement that the tow was being towed at its own risk, would you omit that if there was a higher premium paid?

A. Why, yes, if for instance, they expect us to carry insurance, you mean, on the tow, protect it in that way? In the event that we were forced or asked to carry insurance on the tow, it would be plus whatever the premium was, the towing rate. Of course, that is not usually done. It is not done at all.

Q. Would that be the only difference?

A. You mean so far as the rates are concerned?

Q. Yes, in other words, to omit that clause, we will say?

A. This particular clause you are talking about?

Q. Yes, would you omit that at all, in any of your contracts?

A. Not on outside towing. It is omitted sometimes. Maybe the circumstances would be such that it would be omitted there in the harbor.

Q. Now, by outside towing, you mean what?

A. I mean anything that goes to sea.

Q. So that clause would not be omitted?

A. Not at sea, no, sir.

Q. And at sea, does that comprise the Gulf of Mexico?

A. Yes, sir.

228 Q. Now, you said in there that you might, if the party desired, take out insurance on the tow and you would charge them the premium?

A. Yes, sir, plus the towing charge.

Q. But in a case of that kind, would you agree to take out insurance, or permit the owner of the tow to take out insurance, and if a loss occurred to the tow, that the insurance company could look to you then, for the payment of that loss, not the premium, but the loss itself?

A. I couldn't say as to that, because it is not done, you know, it is not done.

Q. Well, that is just it. I don't know want you to go into those things that are not done.

A. Here is the proposition, if you would let me go into it a little further. They would ask us for a price to take a tow, say from Houston to Tampico. Well, we give them a price. It is always customary, either verbally or written, for us not to accept this tow, if the tow-boat is liable in any way. They would say, "Well, suppose we take insurance"; if we pay the premium? I would say, "No, I don't believe we would," because there is a whole lot of difficulty in placing the insurance, paying the premium, etc., but I suppose those things are accepted if the other man is willing to pay the towage, plus the rate of insurance. I suppose the tow-boat company would accept it under those conditions.

Q. Have you ever done that, Captain?

229 A. No, sir.

Q. But if the tow-boat company understood that it was going to be responsible anyhow, whether insurance was taken out or not, there would be no incentive for their doing it, would there?

A. No, sir.

Q. Captain, how many tow-boats are operated by these two companies you have mentioned?

A. Well, there's five being operated now. They have operated seven.

Q. Do you know the seven? Do these companies own the seven tow-boats?

A. The companies together, the Buffalo Bayou Company and the Ryan Company.

Q. You know D. M. Picton & Company, at Port Arthur?

A. Yes, sir.

Q. How does their business in the tow-boat business compare with that of other tow-boat companies there?

A. At Port Arthur?

Q. Yes, at Port Arthur.

A. You mean in respect to the boats?

Q. Both as to the boats and the amount of business that is done by them?

A. Well, I don't know about the amount of business, but they have about an equal amount of boats as other companies over in Port Arthur, and I suppose
230 they do about the same amount of business, and their boats, if anything, are a little bit better.

Q. With respect to the amount of business that is done by your companies here in Houston, how does that compare with the general tow-boat business done out of this port?

A. Well, we are the only tow-boat concern here. We practically do the majority of the work.

Q. You say you are the only tow-boat concern?

A. Yes, sir.

Q. Here at Houston?

A. Yes, sir.

Q. Do you know whether not copies of these tariffs, copy of this tariff, "Libelant's Exhibit No. 2," are on file with the different Shipping Board offices in the Gulf ports?

A. Yes, sir.

Q. And all of then contain that notice in there? That is, on page 4 of this exhibit?

A. Yes, sir.

Q. Do you know of any tow-boat company at any Gulf port that undertakes to do any towage, particularly outside towage, Gulf towage, that does not embody in its contract verbal or written, this condition that the services shall be rendered at the risk of the tow?

Mr. Kelly:
We object to that as leading.

231 A. There is not any of them operating that I know that does not, either in that form or another, deny liability.

Q. And you have been in this business on the Gulf for practically twenty years?

A. Well, I have been practically twenty-five or thirty years altogether, about fifteen years in an executive capacity.

Q. And by that you mean in a position, making contracts for towage service?

A. For the last fifteen years, yes, sir.

Mr. Grace:
The tug-boat tariff for the Buffalo Bayou Company, referred to heretofore, and marked "Libelant's Exhibit No. 2 for Identification," is offered in evidence in connection with the testimony of this witness.

Mr. Dart:
We object to it on the grounds heretofore urged, and move to strike it out.

(The exhibit was thereupon marked as requested.)

Q. Has your company had occasion to engage tow-boats from other companies to help out in towage contracts at any time?

A. Only in the harbor.

Q. No outside business?

A. No, sir, that is, we have not asked any other tow-boat company to help out on any of our outside business. We do frequently get other towboats to help out on the inside.

Q. Yes. Well, we are interested more particularly in the outside business. That is, in a matter from
232 Tampico to Freeport, that would be outside business.

A. Well, we have never had occasion to ask, since I have been with the company, never had occasion to ask for outside help.

Q. Service from Tampico to Freeport, Texas, is what you would call outside business?

A. Yes, sir.

Cross Interrogatories.

Questions by Mr. Dart:

Q. Did you say that you were the only tow-boat concern in Houston?

A. Yes, sir.

Mr. Grace:

He had mentioned two concerns.

A. (Continuing.) Buffalo Bayou Company and the D. W. Ryan Tow Boat Company.

Q. You mean those two companies are the only two tow-boat companies doing business at Houston?

A. That is their home port, yes, sir.

Q. Do you do any outside towing?

A. Yes, sir.

Q. What do you mean by outside towing?

A. Anything seaboard, from Galveston, from the outside seaboard at Galveston.

Q. From the outside seaboard at Galveston to various ports on the Gulf?

A. Yes, sir.

Q. Have you ever had any occasion to make
233 any towing from Galveston to Tampico?

A. Yes, sir.

Q. What did you tow down to Tampico?

A. A lot of barges and tugs.

Q. You say you always put in your contracts this clause relieving you from liability. Is that correct?

A. Yes, sir.

Q. But if the owner of the barge, or the tow, would be willing to cover the barge with insurance and pay the premium, then you would not insist on that clause relieving you from liability. Is that correct?

A. Why, as far as the damage to the barge, yes, sir.

Mr. Grace:

Wait one minute. He said on outside business he would not do it.

A. (Continuing): On outside business, you know, we would not do that. We would not accept any liability at all on outside business. If you will let me, I have got a letter here.

Mr. Dart:

We will come to that in just a minute.

A. (Continuing): Well, that is just customary, and all the business we have with the tow-boat company, that is a typical letter.

Q. Well, then, on inside business, as I understand it, if the owner of the barge or the craft being towed covers

the boat with insurance against the usual risks of the sea, and pays the premium, that is, allows you to add the premium to the usual towage rate, you don't
234 insist upon this clause relieving you of liability? Is that correct?

A. On the inside?

Q. On the inside towing?

A. Yes, sir.

Q. That is the rule?

A. That is what I would do.

Q. When you say "you," you mean the D. W. Ryan Tow-Boat Company does?

A. Yes, sir.

Q. In other words, so far as matters growing out of your own fault or negligence or wrong are concerned, you are willing to bear the responsibility?

A. I don't mean, now—this is just some special work that I am speaking about, where insurance is carried. Some regular job. I don't mean the regular harbor work, because this sticks in the harbor work.

Mr. Grace:

Referring to Libelant's Exhibit No. 2.

Q. In your direct examination, I understood you to say that on all inside work, if the owner of the barge or tow would pay for the insurance and cover the craft with insurance, you would not insist on the clause relieving your company from liability for negligence. Is that correct, or not?

A. No, it is not correct. I say that is correct in some special work, that I made a contract. In usual harbor work, we accept no liability for damage, irre-
235 spective of whether the ship has insurance or not, because we could not, we could not move a ship for $40.00 that is worth $2,000,000.00, and then attempt to be liable for what damage is done.

Q. No, but suppose the boat is covered with insurance, you see, and suppose some accident was met with, due to the fault of your own people on your own tug, wouldn't you be willing to assume responsibility for your own faults?

A. No, not for that price. We cannot do it. That is why we put this clause in there.

Q. In other words, you can't do that, because the money you get for the service is too small?

A. Yes.

Q. It would not pay you to assume that sort of a risk for that small price?

A. Yes, sir.

Q. The same thing is true of outside work, you cannot assume that risk for the small amount you get for your services. That is what you mean, is it?

A. Yes, sir.

Q. Now, do I understand you to say that you have never in any case towed a vessel wtihout requiring a waiver of liability?

A. Well, we accept lots of work, you know, in the harbor here, that the question does not come
236 up. We figure that by putting them all on notice is sufficient. Now, whether it is or not, I don't know.

Q. You put them on notice in what way?

A. This way.

Mr. Grace:

Referring to Libelant's Exhibit No. 2, the notice on the back, page 4.

Q. That is the notice of the Buffalo Bayou Company?

A. That is the only company I am speaking for, the Buffalo Bayou Company and D. W. Ryan. They both have the same clause in their tariffs.

Q. Have you published a notice—when I say "you," I mean has D. W. Ryan published the same sort of notice as the Buffalo Bayou Company?

A. Exactly like that, yes, sir.

Q. When did you print such a notice?

A. Oh, I don't know. It has been several years.

Q. Well, do I understand you to say that you have never made a contract for outside towing without requiring waiver of liability?

A. I have never made a contract for outside towing whereby I agreed to be responsible for the tow in any way.

Q. Even though the loss was caused by your own fault?

A. Even though—it don't make any difference. That is the way the job is taken, that the crew is not liable for anything that happens.

Q. If the owner objects to making such a
237 contract, you wouldn't make the contract with him?

A. We would not make the tow if he was dissatisfied with that kind of business.

Q. And you wouldn't take the business?

A. No, sir.

Q. Without having it specially provided that you would not be responsible for the losses?

A. No, sir.

Q. Otherwise, he would have to get some other tugboat to tow his boat?

A. Yes, sir.

Q. If there was no contract, you do not intend to say that that is the law, do you?

A. No, sir, I don't; it is just something that I, as manager of the company, would want it understood that the tow and the crew is not liable for the vessel being towed.

Re-Direct Interrogatories.

Questions by Mr. Grace:

Q. You spoke about having a letter in identical form with the character of contract that you required on the outside. Have you got that letter?

A. Yes, sir.

Q. That is the letter you produced here, the D. W. Ryan Tow-boat Company?

A. Yes.

Q. That outlines the nature and character
238 of contract, then, that the D. W. Ryan Tow Boat Company and the Buffalo Bayou Company make?

A. Yes, sir. That is the usual and customary way that I have been handling the business. It is either verbal or written. Of course, there is no regular charter or contract. Usually they just simply call you up over the 'phone, maybe, and offer you some work, and you make them a price, and they will ask you to confirm it by letter.

Q. This letter is in form confirming a conversation.

A. I say that is similar to half a dozen others that I might get out of the office. I just happen to get that one.

Mr. Grace:

The letter produced by the witness is offered in evidence and marked "Libelant's Exhibit 3."

Mr. Dart:

It is objected to on the grounds that it is res inter alios acta, irrelevant, incompetent, immaterial, and not the best evidence, hearsay, and we move to strike it out for the same reason.

Q. Have you got a copy with you of the D. W. Ryan Tow Boat Company tariff?

A. Yes, sir.

Q. Is it identical with the Buffalo Bayou Company?

A. Yes, sir.

Q. Same prices?

A. Yes, sir.

Q. And same notice on page 4?

229 A. Yes, sir.

Q. Is the D. W. Ryan Tow Boat Company tariff on file, too, at the various shipping board offices throughout the Gulf?

A. Yes, sir, the D. W. Ryan Tow Boat Company are operating and taking over the business of the Buffalo Bayou Company.

Q. Have they a tariff in their own name, the D. W. Ryan Tow Boat Company?

A. Yes, sir.

Q. And that tariff is on file, too, in the various U. S. Shipping Board offices?

A. Yes, sir, all tow-boat companies have the same, so far as I know.

Q. Throughout the Gulf?

A. I could not say. If they haven't that in that form, then it was in the typewritten form.

Q. Same form or other?

A. Yes, sir.

Re-Cross Interrogatories.

Questions by Mr. Kelley:

Q. Most of your company's business is inside work, isn't it?

A. Yes, sir.

Q. Very little of it outside work?

A. The majority of it; it is about fifty-fifty, say from Houston to Port Neches, we have got a boat steadily employed outside. From Port Neches to Orange, and Big Eddy, that is above Orange, we of course use the river to the sea, then they use the sea to Galveston, then from Galveston to Houston is inside; a distance of about 60 miles in the open Gulf.

Q. Well, the only thing I had in mind was, my impression was that your boats as a general rule were not outside boats, and they did very little outside work compared with the amount of inside work.

A. Well, with the exception of the Orion, that is true, but the Orion is mostly on the outside.

(By Mr. Grace):

And the amount of business between outside and the inside is about fifty-fifty?

A. Well, the Orion is busy always outside. It has been. Of course, business varies, you know.

EXHIBITS INTRODUCED IN THE FOREGOING DEPOSITIONS.

LIBELANT'S EXHIBIT No. 1.

This exhibit appears in the record at pages 10 and 11.

LIBELANT'S EXHIBIT No. 2.

A copy of this exhibit is attached hereto.

LIBELANT'S EXHIBIT No. 3.

D. W. Ryan, President and Manager.
Ed. Minor, Secretary and Treasurer.
D. W. Ryan Towboat Co.
Room 7, Merchants State Bank Building.
General Harbor and Coastwise Towing.
Lightering and Coastwise Oil Towing a Specialty.
P. O. Box 927. Phone 749.
Look for "R" on Stack.
Tugs: Mary B. Curtis, Orion, Neches, Ellis.
Barges: Garden City, Duke, Lewis.
Port Arthur, Texas.

Sept. 24th, 1920.

Gulf Export and Transportation Company,
Beaumont, Texas.

Gentlemen:

As per our conversation with your Mr. Edwards over phone:

We will engage our tug "Orion" to tow your Barge from Beaumont, Texas, to Aransas Pass, Texas, for the sum of Twenty-five ($25.00) per hour, time starts when the tug leaves Port Arthur for Beaumont, to pick up barge, and to continue until the tug arrives back in Port Arthur, Texas. We will also furnish a nine inch hawser for the sum of one hundred dollars, to make this tow, same to be inspected and accepted by your company. No responsibility, however, will attach to the D. W. Ryan Towboat Company or the tug "Orion" in connection with the use of this hawser; your company accepting and using same at your risk; neither will the D. W. Ryan Towboat Company, or the tug "Orion" be responsible in any way whatsoever for the safe delivery of the Barge at Aransas Pass, Texas. It is further agreed that all port charges if any are to be paid by your company.

242½

Our responsibility ceases in providing the tug in first class condition and properly manned and equipped. Please sign and return one of the enclosed copies.

Yours truly,

D. W. RYAN TOWBOAT COMPANY,

(Sgd.) PER ED. MINOR.

Accepted:

GULF EXPORT AND TRANSPORTATION COMPANY,

Per (Sgd.) J. S. EDMONDS, Vice-Pres.

243 RESPONDENT'S EXHIBIT No. 1.

Freeport Sulphur Transportation Co.

S/S Freeport Sulphur No. One From Tampico, Mex., to Freeport, Tex., Voy. No. 235.

Tuesday. Remarks: 6 day of June, 1922.

3:15 Pilot H. Vongas aboard 3:28. Tested out steering gear and telegraphs, found O. K. 3:32 stand by.

3:47 Let go oil docks Torres Half ahead 4:40 slow ahead.

4:45 Tug Wash Gray in tow.

5:41 Crossed Tampico Bar 5:43 slow speed 5:44 stop.

5:46 Pilot H. Vongas off 5:55 Hawser all fast.

6:00 Departure Towing Wash Gray from Tampico to Freeport, 4-8 Light E. Breeze, Calm sea, clear weather, Tug towing O. K.

8:10 Sighted Jerez lt. 8:25 Jerez lt. on 4 pts.

9:25 Jerez lt. abm. 10½ miles off.
8:12 Light Ely Breeze, Clear weather, Smooth sea, Tug Towing O. K.

Wednesday, 7 day of June, 1922.

12-4 Tug towing O. K.
Light Ely. Breeze partly cloudy Smooth Sea.
8 a. m. C/C to N. 16 E. Std.
Light SE. wind, Calm Sea, Clear weather.
4-8 Tug towing O. K.
8-12 Tug towing O. K.
Light Ely Breeze Smooth Sea and Partly Cloudy weather.
Light East Breeze partly Cloudy and squally small swell.
Light E. wind, small swell, Frequent showers.
244 11:30 slow down engine. Crew on tug "Wash Gray" waiving Red light 11:45. Mexican Crew on tug cut Hawser 12:00 all hands on deck heaving in Hawser. Steaming up alongside tug. Mexican crew demanded to be taken off as tug was short of fuel & leaking badly.

Thursday, 8 day of June, 1922.

1:45 A. M. Lowing port life-boat with Chief Officer and 5 men.
2:25 Boat returned to ship and report no water and oil on the tug and boilers killed & crew demanded to be taken off as tug was leaking badly.
2:45 Life boat returned to ship with Mexican crew of tug Wash Gray, 6 men in all.
Standing by until day-light.
5:15 As tug did not appear to settle deeper, lowered a life-boat and Chief Officer and Chief Eng. going on board tug for examination.
6:00 Towing hawser made fast on tug—proceeded slow speed.

10:20 Unable to get up steam on tug water gaining so fast that further work is useless.
Life boat returned to ship and taken on board.
11:2 A. M. Tug. "Wash Gray" sunk—full ahead.
12-4 Mod. N. E. Breeze Cloudy & Squally weather, Choppy Sea.
4:00 Streamed log.
6:40 Sighted Madagorda stacks 2 pts. on port bow.
7/20 C/C to N64E. Std. Madagorda abeam.
8-C C to N. 70E Std. strong E. wind squally weather with showers.
245 10:20 sighted Brazos lt. 11:15 Hauled in log 139. Light E. Breeze Cloudy weather small swell.

Friday, 9 day of June, 1922.

12:10 Stand by Engine. 12:11 Half ahead, Arrival Freeport sea bouy 12:15, Stop 12:18, let go anchor 30 fathoms.
12:20 R. O. E.
12-4 Mod. N. E. Breeze, Cloudy & Rain showers.
7:30 Hove up & moved out to deeper water, large swell.
8:10 Let go anchor 6 fathoms of water.
8: 3 R. O. E. 9:00 Pilot Smith aboard stand by.
9:12 Half ahead anchor up.
9:12 Struck the ground on bar 12:00, run a line to Comstock.
12:55 Line parted from Comstock.
1:00 Off the ground full ahead to turn around at sea buoy; 1:35 crossed Freeport Bar.
2:— R. O. E. Made fast dock Freeport.

(Sgd.) G. C. HASLUND,
Master.

246 DEPOSITIONS OF WILLIAM H. YOUNG AND JAMES P. RONEY, TAKEN AT THE OFFICE OF MESSRS. ADAMS & PORTER, No. 27 WILLIAM ST., NEW YOURNG, SAID WITNESSES BEING FIRST DULY SWORN, ON BEHALF OF LIBELANT.

(Titles Omitted.)

Appearances:

John D. & M. A. Grace, Esqrs. (Mr. John D. Grace) for the libelant;

Messrs. Dart, Kernan & Dart, Messrs. Bigham, Englar & Jones (Mr. Potter and Mr. McKernan) for the respondents.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable, copy to be served on opposing counsel.

WILLIAM H. YOUNG, being duly sworn and examined as a witness for the libelant, testified as follows:

By Mr. Grace:

Q. Where do you reside?

A. Stamford, Conn.

Q. What is your business?

A. Marine insurance.

Q. How long have you been engaged in that business?

A. Over 20 years.

Q. In this line of marine insurance, what is your usual course of business or operations, what is it that you do?

A. We handle and negotiate the orders of our clients and place them with the underwriters for those companies which we do not represent as agents.

247 Mr. Potter:

May we have it appear whom the witness means by "we".

Q. In speaking of "we" in connection with whom do you attend to that?

A. My firm.

Q. And the name of the firm?

A. Adams & Porter.

Q. That is this firm here of New York City and where?

A. Of New York and Houston—I would like to explain that answer further.

Q. Go ahead.

A. The firm of William H. Young & Company is also identified with the firm of Adams & Porter; for purposes of facilitating our business, the names of the two concerns are still kept, but to all intents and purposes they are one and the same thing.

Q. Was any application made to your firm for the placing of insurance on the tug Wash Gray sometime last spring a year ago?

A. Yes—that is last spring a year ago.

Q. For whom did you act in respect to that matter in placing insurance?

Mr. Potter:

Objected to as calling for a conclusion, the witness may state what he did, it is for the Court to determine for whom he acted.

Q. The question is for whom did you act, Mr. Young?

A. For the company, the Compania de Navegacion. Interior, S. A.

Q. Who is the head of that concern, the
248 president?

A. Fred A. Barbour.

Q. Is he present here?

A. Yes.

Q. For the purpose of placing that insurance, and if you placed that insurance, to whom did you apply?

A. I will have to refer to my records to give you that absolutely straight—if I can remember without referring to them—

Q. If you have the records here that were made at the time.

A. Do you want me to refer from memory or may I look at them?

Q. If you can't remember.

A. Talbot, Bird & Company representing several companies; Globe & Rutgers Insurance Company; William H. McGee & Company representing several companies; the Fireman's Fund Insurance Company; Carpinter & Baker, representing several companies; The Vessel Agency representing several companies; if I recall correctly that is all, but there may be others.

Q. And as a result of your efforts, what amount of insurance was placed on the Wash Gray?

A. $85,000.00.

Q. Mr. Young, will you relate what it was, as far as you can remember, that occurred between yourself, you as one of the firm placing this insurance, and the representatives of the underwriters with whom the insurance was placed, in other words whom you first called upon, what conversation you had with respect to placing the insurance and what the result of it was?

249 Mr. Potter:

Objected to as incompetent, irrelevant and immaterial, any oral negotiatiions are merged in the written instrument; the question propounded to the witness sought to elicit information which has no bearing or in no way relevant to the issues now on trial.

A. Sometime in February 1922, we received an order from our house in Houston to insure $85,000.00 on the hull of the Wash Gray, which was intended to be towed from Tampico to Galveston; at that time it was expected that the tow would be made behind either the steamers Tapila or Torres of the Southern Pacific Company, and application was made to the underwriters to cover that amount of insurance on that voyage. The risk was not binding at that time, however, because Captain Barbour's arrangements appeared to be such that there might be on indefinite delay in making that trip. Whatever insurances were an inquiry or had been bound, therefore, subject to those terms, were canceled. Later on in about March, sometime around the middle of March we were again notified by our Houston office that the trip would probably be made in tow of the steamer Tamaihua, and we were again asked to arrange insurance in tow of that vessel. I, therefore, felt it expedient to see the same underwriters that I had seen when the risk was first presented, and I did so, and I arranged

250 $85,000 insurance with those underwriters on a form of application which was drawn up in this office, and approached first—if I remember correctly—the officers of Talbot, Bird & Company, William H. McGee & Company, and the Globe & Rutgers, all of whom accepted the lines which they eventually wrote on the terms of the application as I presented it to them. I then approached the Fireman's Insurance Com-

pany, the office of Carpinter & Baker and the office of The Vessel Agency. The office of the Fireman's Fund made a change in the form of my aplication which was to the effect that the surveying or rather the approval of the vessel and towing arrangements should be made by representatives of the United States Salvage Association of Tampico, Mr. James Taylor.

Mr. Potter:

At this point I would like to object, and have an objection on the record, to the effect, first, that any negotiations or communications between Captain Barbour and this witness, between the Houston office of this witness and this witness, are in no way binding on any of these respondents; second, that the witness is testifying as to thoughts, impressions and conclusions; third, that he is testifying regarding the contents of written instruments; and fourth, that he is testifying regarding negotiations which he said himself were merged
251 into written documents, and I protest at the examination proceeding in this way, and I insist that from this point on the examination proceed in the usual and ordinary way of conducting a deposition, namely by the propounding of questions to the witness. I therefore move to strike out the entire testimony given up to this point.

Q. I understood then, for the purpose of effecting this insurance, you applied to these parties mentioned, and that a change was made in the form of application which you had drawn with respect to certain surveys?

Mr. Potter:

I object to the question, first, on the ground that it is leading, suggestive, and improper in form, it is a state-

ment of counsel, it is argument of counsel, it is not sought to elicit information from the witness. I call attention particularly to the fact that we have no one present to rule upon the question; it is a kind of question which could not be propounded in Court, and I protest at this sort of question being propounded to this witness; it calls for a conclusion, calls for the contents of written instruments, and it is improper under every rule of evidence known to man.

Mr. Grace:

252 The Court's attention is called to the fact that the question is a summary of what the witness has testified to. We most firmly object to this record being encumbered in this way, counsel may note his objections and argue those objections before the Court.

Mr. Potter:

Counsel for the respondents is advised as to what his rights are, and he is directing the attention of counsel for the libelant to the nature of the questions which he is now propounding, so that he may reframe them in proper form if he so desires, because, when this deposition is offered, if it is ever offered, counsel for the respondents will call the attention of the Court to the fact that the libelant's counsel had his attention directed to the form of questions which he was propounding, so that he might have an opportunity to reframe the questions if he so desired.

Mr. Grace:

I thank the counsel for his suggestions, but in reply will say that at this time I do not care to avail myself of his assistance in the matter of framing questions to my own witness.

Mr. Potter:

In view of the statement made by counsel for the libelant, I again urge my objection and move to have the testimony suppressed, as it is improper in
253 form and improper under every rule of evidence known.

Mr. Grace:

We give notice to counsel that if he persists in encumbering the record with argument and questions of law, we will ask the Court that he be taxed personally with the cost of that testimony.

Q. Now, Captain, please answer the question.

Mr. Potter:

Counsel for the respondents in reply states that if counsel for the libelant will frame his questions in such form that they are not susceptible to objection, no objections will be made. No one is more desirous than counsel for the respondents that this hearing proceed expeditiously and in the form provided by law and according to the rules of evidence.

Q. Mr. Young, just answer the question.

A. Yes, a change was made by the Fireman's Fund Insurance Company as already outlined.

Mr. Potter:

I move to strike out the answer as it endeavors to state the contents of a written instrument.

Q. And Mr. Taylor's name was used in that application and in the policy at the instance of whom?

Mr. Potter:

I object to the question on the ground that
234 it calls for the contents of a written instrument,
the instrument itself is the best evidence of what
it contains, all prior negotiations being merged in these
written instruments.

Q. Mr. Young, you will notice I have not asked you anything about the contents of a written instrument, I have asked you at whose instance was the name of Mr. Taylor inserted in that document?

Mr. Potter:

I object to the question for the same reason, and further on the ground that it is an argument and statement of counsel and it is not a question. I protest to this examination proceeding unless it is done in the usual and ordinary way of conducting a deposition, namely by the propounding of questions to the witness and eliciting answers of the witness.

Q. Go ahead.

A. By Mr. Page of the Fireman's Fund Insurance Company, followed by the office of Carpenter & Blake and the office of The Vessel Agency.

Q. What was the purpose and use or occasion, as understood by you, engaged in that particular line of business for the number of years that you have, in having parties survey or appraise as per the terms of a policy, the condition of the vessel and towing arrange-
235 ments?

Mr. Potter:

Objected to on the ground that it is incompetent, irrelevant, immaterial, the purpose being in no way

persons to the issue now on trial. The witness is in no way qualified to express an opinion, his opinion or desires or intentions or understandings are in no way competent, and I protest that any such question be propounded to the witness, and I ask that from now on this witness be confined to the things with which he was familiar or of which he knows.

A. For the purpose of conveying to the underwriter by competent conveyance the fitness of the vessel to make the trip, her seaworthiness, and the ability of the towing vessel to tow her, those are the principal reasons.

Mr. Platten:

I move to strike out the answer for the reasons already stated.

Q. As a matter of fact, I understood you to say you had insured $65,000.00 of insurance?

A. Yes.

Q. On that vessel for that particular voyage?

A. Yes.

Q. In line with that service, did you subsequently receive any communication from Mr. James F. Taylor, the gentleman whose name you have mentioned—

A. Yes.

Q. (continuing) respecting the question of examination of the vessel and ability to make the
256 trip, towing arrangements?

A. Yes, sir.

Q. Did Mr. Taylor in any of those communications to you, communicate the fact whether he had or had not approved the Wash Gray for that particular tow and the towing arrangement?

Mr. Potter:

I object to the question first, on the ground that it is incompetent, irrelevant and immaterial; secondly, on the ground that it calls for a conclusion of the witness, thirdly, it calls for the contents of a written instrument; fourth, that it is not binding upon any of these respondents.

A. I don't recall for certain that he sent me any communication respecting the proposed tow behind the Tamaihna.

Q. Do you recall whether or not anyone else besides Mr. J. F. Taylor also had made survey of the Wash Gray and so on for that particular trip?

Mr. Potter:

I object to the question on the ground that it is suggestive and leading.

A. That particular trip which I have described was not made.

Q. Coming down to the question of the tow that was performed by the steamer Freeport Sulphur No. 1, do you recall whether or not Mr. Verne Dyer and Mr. J. F. Taylor or either one of them sent you a communication?

237

A. I do,—both of them did.

Q. Who was Mr. Verne Dyer?

A. Surveyor to the correspondent of Lloyd's at Tampico.

Mr. Potter:

I object to the question and move to strike out the answer as it states a conclusion.

Q. During how long a period of time have you known him to be such?

Mr. Potter:

I object to the question on the ground that it calls for a conclusion and hearsay; manifestly, this witness can give no testimony regarding any such question now propounded to him.

A. Four or five years.

Mr. Potter:

I move to strike out the answer on the grounds already stated.

Q. Did you receive advice from the owners of the Wash Gray as to when that vessel was lost at sea?

Mr. Potter:

I object to the question on the ground that it calls for a conclusion, incompetent, irrelevant and immaterial, not binding on these respondents.

A. I received advices from our Houston office, if I remember correctly.

Mr. Potter:

258 I move to strike out the answer on the grounds already stated.

Q. Upon receipt of the advice of the loss of the vessel, irrespective of whether it came directly from Captain Barbour or through your office, did you communicate that fact of the loss of the vessel to the underwriters?

Mr. Potter:

I object to the question on the ground that it calls for a conclusion, leading and suggestive and improper in form; it is for the Court to say what the witness' acts amounted to.

Mr. Grace:

We submit that it is perfectly manifest that the Court cannot say anything about the witness' acts until the witness testifies what those acts were.

Mr. Potter:

If the witness is asked what he did, you might elicit the information in the usual and proper way.

A. We did.

Q. That communication was brought to the underwriters in this case, in what form—that is to say whether verbal or written?

A. Written form.

Q. Was that communication made to each and every one of the underwriters on the Wash Gray covering the $85,000.00 of insurance?

259 Mr. Potter:

Objected to as calling for a conclusion.

A. Yes, sir.

Q. The original of those communications, of course then, would be in the possession of the underwriters in this case?

Mr. Potter:

I object to the question as suggestive and leading, a statement of counsel for the libelant, is improper in form and calls for a conclusion.

A. Yes, sir.

Q. Can you identify this (handing witness paper) as a carbon copy of the letter?

Mr. Potter:

I object to the characterization of the paper now submitted to the witness.

A. Yes, sir.

Q. Up at the top of this carbon paper is run in typewriting, that this letter was sent to—designating six different firms—are they agents respectively of different underwriters concerned as defendants in this case?

Mr. Potter:

I object to the question, first, on the ground that it is leading, suggestive and improper in form, secondly, that it calls for a conclusion; third, not the proper manner in which to interrogate a witness concerning a paper exhibited to him.

260 A. Four of them are agents, one is the home office of the company itself, the other is the New York branch of the company.

Mr. Potter:

I move to strike out the answer on the grounds already stated, and on the further ground that it is not responsive.

Mr. Grace:

This carbon copy is offered in evidence in the absence of the originals of this letter, which is shown to be in the possession of the respective defendants in this case or their agents.

Mr. Potter:

I object to it on the grounds, first, that the characterization by counsel for the libelant of what the paper is does not establish the fact that it is what he characterizes it to be; secondly, on the ground that the paper has not been proved or authenticated; third, on the ground that there is absolutely no evidence of what the paper is; fourth, on the ground that it is incompetent, irrelevant and immaterial; fifth, on the ground that it is not germane to the issues now on trial; sixth, on the ground that there is no evidence whatsoever as to when, if ever, this paper now offered was sent or
261 exhibited to anyone.

It is marked Libelant's Exhibit A 1.

Q. By whom was the letter itself signed, Mr. Young?

A. I do not recall.

Mr. Potter:

Then I renew my objections on the grounds already stated.

The Witness:

May I answer it further?

Mr. Potter:

I object to any statement by witness without a question being propounded to him, and insist that this examination proceed in the usual and customary way, namely by propounding of questions to which the witness should direct his answers.

Q. Anything further you may say or desire to say with respect to the signing of that letter I would be glad to have you say it.

Mr. Potter:

I object to any such statement of counsel, and I protest to this examination proceeding in any other way than the usual and customary way in the manner provided by law for taking of depositions, namely by the propounding of questions to the witness.

A. It was signed by either Mr. Adams or myself.

262 Mr. Grace:

We call upon the respondents in this case, and each one of them, to produce the original of this letter (Libelant's Exhibit A1) and to make return under oath that such letter has not been received by them, and in the absence of the original, we persist in our offer of this carbon copy.

Mr. Potter:

Counsel for the respondents states that he does not know whether any such letter was ever sent to any of the respondents; he is proceeding with this examination at this time as an accommodation to counsel for the libelant, and he never heard of the case or the issues here involved until 5 o'clock yesterday afternoon, and he has not had an opportunity to examine the files or the documents. If any such paper as the paper now referred to ever came into the possession of any of the respondents, they will very gladly produce the original.

Q. Do you know whether or not your firm acting as or on behalf of the owners, advised the Board of Underwriters of New York of the loss of the tug Wash Gray?

A. We did.

Q. Verbally or in writing?

A. By letter.

Q. What is the Board of Underwriters of New York?

263 Mr. Potter:

Objected to first, on the ground that it calls for a conclusion; secondly, on the ground that it is incompetent, irrelevant and immaterial; third, that the witness manifestly is not competent to state an opinion or to state a conclusion or to give any opinion as to what the Board of Underwriters of New York is or is not, and he does not claim or is not claiming at this stage of the proceeding that he had any familiarity with the Board of Underwriters of New York, its organization or any of its affairs.

A. It is an organization subscribed to by the marine insurance underwriters of New York for the purpose of facilitating joint action in the matters pertinent to the business of marine insurance and the handling or supervision of more or less preliminary matters in respect to losses and disasters.

Mr. Potter:

I move to strike out the answer on the ground already stated, and on the further ground that the answer states a conclusion; the witness does not claim to be an underwriter, he does not claim to be a lawyer, and he manifestly is disqualified to express the opinion which he has just given.

264 Q. From what source have you learned those facts, Mr. Young?

A. 20 years' experience in the marine insurance business.

Q. Where?
A. In New York City.

Mr. Potter:
I move to strike out the answer and all this testimony out because of the witness' own statement just made as to how he acquired this information. Manifestly, any information he has on this subject is hearsay, and I am deprived of the opportunity of cross examining the witnesses or the persons from whom he may or may not have received this information.

Q. Can you state whether or not this carbon copy dated June 9, 1920, which purports to be a copy of a letter written to the Board of Underwriters of New York, was written by your firm (handing witness paper)?
A. It was written by one of the firm.

Mr. Potter:
I move to strike out the answer on the ground that it is not responsive.

Q. State whether or not you do or do not know, as a matter of fact, that such a letter was sent to the Board of Underwriters of New York, on or about the date designated in here, June 9, 1922.

Mr. Potter:
I object to the question as incompetent, irrelevant and immaterial, improper in form.

265 A. It was.

Mr. Grace:

This carbon copy is offered in evidence, and for the purpose of identification mark it Libelant's Exhibit A2.

It was so marked.

Mr. Potter:

I object to it on the ground that the characterization by counsel for libelant of the paper, does not establish that the paper is what he claims it to be; secondly, on the ground that it has not been properly proved or authenticated; third, it is incompetent, irrelevant and immaterial; fourth, it has no bearing or is in no way germane to the issues now on trial.

Q. Will you please state whether or not, in reply to the letter you have just stated you or your firm wrote to the Board of New York Underwriters, this letter was received (handing witness paper)?

Mr. Potter:

I object to the form of the question as leading and suggestive, and calls for the contents of a written instrument.

A. It was received by us.

Mr. Grace:

I offer it in evidence and for the purpose of identification, mark it Libelant's Exhibit A3.

266 It is so marked.

Mr. Potter:

I object to it on the ground that it is incompetent, irrelevant and immaterial, and is in no way binding upon the respondents.

Q. This particular letter (handing witness paper) was received from whom and in reply to what?

Mr. Potter:
I object to the question as it calls for the contents of a written instrument.

A. It was received from The Vessel Agency in reply to our letter of June 9th, reporting the loss of the tug Wash Gray.

Mr. Grace:
This letter is offered in evidence, and for the purpose of identification mark it Libelant's Exhibit A4.

Mr. Potter:
No objection.

It is so marked.

Q. Do you know whether or not other underwriters involved in this case, either by themselves or through their agents here, answered in terms similar to that (Libelant's Exhibit A4.)?

Mr. Potter:
I object to the question on the ground that it is leading and suggestive, calls for a conclusion, and calls for the contents of a written instrument.

267 A. I believe they did.

Mr. Potter:
I move to strike out the answer on the grounds already stated, and on the further ground that it is not responsive.

Q. Do you recall whether or not you or your firm prepared proofs of loss and filed in connection therewith certain documents and papers with the various underwriters involved in this case as defendants or respondents?

Mr. Potter:

I object to the question on the ground that it calls for a conclusion.

A. We did.

Q. Will you kindly look at this document (handing witness paper) and state what it is?

A. It is a receipt from all of the interested underwriters, but one, of the original documents and copies thereof which we accumulated and drew up and then filed in support of the claim for the loss of the Wash Gray.

Mr. Potter:

I move to strike out the answer as the paper itself is the best evidence of what it is.

Mr. Grace:

I offer it in evidence on behalf of libelant and for purposes of identification, ask that it be marked Libelant's Exhibit A5.

Mr. Potter:

I object to it on the ground that it is incompetent, immaterial and irrelevant, if it is sought thereby
268 to establish that proper proofs of loss were ever delivered to any of these respondents, the paper being but a receipt for certain papers or documents listed on the receipt, and is not acknowledgement by

any of the respondents that proper proofs of loss under the terms and conditions of the several policies were ever received by the respective respondents.

It is marked Libelant's Exhibit A5.

Q. Off on the righthand side are initials and things of that sort, which of course, on the face of the paper (Libelant's Exhibit A5) are not sufficiently explained—I would ask you to take and explain to us the markings on that, for instance opposite the Phoenix Insurance Company in brackets "original paper" William H. McGee & Company general agents, just opposite that on the righthand side is what mark?

A. It is a mark made by the person who received it.

Mr. Potter:

I move to strike out the answer as not responsive.

Q. Who was it that received it?

A. If I recall correctly it was Mr. Buckton.

Mr. Potter:

I move to strike out the answer on the ground that the answer is not responsive and on the ground that the witness has not testified that he knew or
269 had anything to do with the transaction.

Q. Did you personally make deliveries of these papers?

A. No, sir.

Q. Who did?

A. One of our clerks.

Mr. Potter:

Then I move to strike out the answer on the ground that it now appears that the witness has no personal knowledge of the transaction concerning which he is attempting to testify.

Q. Do you know personally whether or not any of papers, as per heading up here (Libelant's Exhibit A3) where you have designated that you are closing goods of hire, particularly the papers specified as general, extended protest, copy of agreement between the Freeport Sulphur Company and C. A. Harlowe, certificate of registry under Mexican flag, sworn statement of C. G. Haviland, master of the Freeport Sulphur No. 1—whether or not such papers themselves were prepared here for delivery to each of these parties?

Mr. Potter:

I object to the question on the ground that it calls for a conclusion, and further on the ground that the witness has testified that he had no personal knowledge regarding the transactions.

A. They were, but I have not testified that.

270 Mr. Potter:

That is for the Court to determine.

Q. Will you state whether or not you can identify any of the signatures on that paper (Libelant's Exhibit A3) as being genuine signatures of the persons whom it purports to be signed by?

Mr. Potter:

I object to the question on the ground that the witness has not been shown to be qualified.

A. I cannot absolutely identify them myself, no sir.

Q. Did any of the underwriters ever at any time complain that they had not received proofs of loss?

Mr. Porter:

I object to the question on the ground that it is incompetent, irrelevant, and immaterial, calls for a conclusion of the witness, not germane to the issues now on trial.

A. No, sir.

Q. Can you say whether or not there was a letter written to the Aetna Insurance Company under date of June 26, 1922 as per this, what purports to be carbon of that letter (handing witness paper)?

Mr. Porter:

I object to the question on the ground that it calls for a conclusion, it calls for the contents of a written document, further on the ground that no proper foundation has been laid for the propounding of any such question.

[179] A. Such a letter was written, yes, sir.

Mr. Porter:

I move to strike out the answer on the grounds already stated, and on the further ground that it is not responsive.

Q. And that original letter was sent to the Aetna Insurance Company, Hartford, Conn., how?

A. By mail.

Q. Registered mail?

A. Registered mail, yes.

Q. Is that the return card and receipt for that particular letter (indicating papers)?

Mr. Porter:

I object to the question as calling for a conclusion of the witness, it calls for the contents of a written document, the paper itself is the best evidence, and the question is improper in form.

A. Yes.

Mr. Glover:

I offer in evidence certain copy of the letter referred to, the registry receipt for the letter at the Post Office, and the registry receipt from the Aetna Insurance Company of the letter.

Mr. Porter:

Counsel for the respondents objects to the characterization of the papers now offered in evidence by counsel for the libellant, and urges that the characterization by him does not establish the fact which he claims, namely that there is any proof that any of the documents now submitted are what he claims them to be, and further on the ground that none of these documents has been properly proved, established or authenticated.

Mr. Glover:

We call upon the Aetna Insurance Company to produce the original of that letter or to make known declaration that such letter was not received by them, and such proofs of loss not contained in any letter received by them, and in the absence of such return, we ask that this certain copy of the receipts be received in evidence.

Mr. Porter:

Counsel for the respondents in reply to this statement says that he never knew or heard of this case until

5 o'clock yesterday afternoon, he has not had an opportunity to examine the files of papers, or to communicate in any way with the persons he is representing at this hearing. If any such letter as is now offered was ever received at any time by the Aetna Insurance Company or any of the other respondents, counsel will be glad to produce such letters at a proper time and place.

The letter and receipts are marked as one, Libelant's Exhibit A6.

273 Q. In your 20 years or so experience, with respect to negotiating and placing insurance, as I understood you to testify, of marine insurance, established here in the City of New York, I ask you whether or not in that experience you have had occasion to deal with this question of sailing vessels, seaworthiness to be approved and towing arrangements to be approved?

Mr. Potter:

I object to the question first, on the ground that it is incompetent, irrelevant and immaterial; secondly, on the ground that as to whether or not this witness has had occasion to have any such dealings is in no way material to the issues on trial, and I direct the witness' attention to the fact that it calls for a yes or no answer.

A. Yes.

Q. Please state then what your understanding of those two terms are—that is to say, vessel's seaworthiness to be approved, and towing arrangements to be approved?

Mr. Potter:

I object to the form of the question on the ground first, that it calls for the construction of a written

instrument; secondly, it calls for an explanation of a written instrument; thirdly, the words themselves are not claimed to be ambiguous, peculiar or unusual in any way; further, on the ground that the witness
274 has not claimed to have had any experience with the issuance of policies or to be an underwriter or to have ever been engaged as an underwriter, or to have necessary qualifications which are requisite to the expression of any opinion concerning a written document or the particular written document to which his attention is now directed.

A. In my experience these firms have meant that the surveyors appointed by the underwriters are to pass upon the fitness of the vessel to perform the voyage proposed; they shall determine and report to the underwriters their opinion of her seaworthiness; they are to make recommendations for the proper fitting up of the vessel for the proposed voyage; and they are to see that they are carried out; they are to approve the vessel which is to do the towing, and that the towing arrangements, such as the ropes, the vessel itself, are in proper condition to make the trip; and communicate the result of their findings to the underwriters.

Mr. Potter:

I move to strike out the answer on the grounds already stated, and on the further ground that it states a conclusion of the witness; it attempts to state a conclusion of law; it attempts to state questions which the Court itself must determine; it purports to
275 state the ideas and thoughts of the witness concerning a matter of which there can be no dispute and concerning which he has expressed an erroneous conclusion.

Q. In these various contracts of insurance, where the terms are used "approve towing arrangements" does that mean to approve anything more than the matters that you have testified to?

Mr. Potter:

I object to the question on the grounds stated when the last question was propounded to this witness.

A. Generally speaking, no.

Q. Has it anything to do at all with the towing contract itself?

Mr. Potter:

I object to the question first, on the ground that the witness has not been shown to be qualified; secondly, on the ground that it is incompetent, irrelevant and immaterial; thirdly, that it attempts to explain, vary or alter the terms of a written instrument; further on the ground that there is no evidence here or can be no claim made here that the words are unusual words, that they are ambiguous, that they are not easily understood or known by men learned and experienced in the particular business; further on the ground that
276 this witness does not claim that he has ever had anything to do with the issuance of policies or that he has had any experience as an underwriter or a person charged with the preparing or drawing up of such documents.

A. In my experience when such terms are incorporated in an application or are referred to by underwriters with respect to towage risks, no mention has ever been made of the terms of the towing contract in connection with towing arrangements.

Mr. Potter:

I move to strike out the answer on the grounds already stated, and on the further ground that it states a conclusion, and is hearsay.

Q. You spoke of placing insurance, preparing papers and being agent for some underwriter, did you not, Mr. Young?

Mr. Potter:

I object to that, the witness has not so testified, and I object to any such question being propounded to this witness; the witness has not so testified; the question now propounded is a statement of counsel, and is leading, suggestive and improper in form, and not proper direct examination.

Q. By referring back to your testimony, Mr. Young, I find that you testified as follows, "We handle and negotiate the orders of our clients and place them with the underwriters for those companies which we do not represent as agents"—what companies do you represent as agents?

277

Mr. Potter:

I object to the question on the ground that it calls for a conclusion; secondly, on the ground that it is incompetent, irrelevant and immaterial; third, on the ground that it is in no way germane to the issues now on trial; further on the ground that it is not proper direct examination; further on the ground that it is leading, suggestive and improper in form; further on the ground that it is a statement of counsel rather than the statement of a witness.

A. We are general agents for the Commercial Union Insurance Company of London, for marine insurance,

operating in the Southern States. We are agents for the St. Paul Fire & Marine Insurance Company, and the Continental Insurance Company of New York.

Mr. Potter:

I move to strike out the answer on the grounds already stated.

Q. How long have you been agent or served as agent, general or special, of insurance companies placing marine insurance?

A. Upwards of 15 years.

Q. And in addition to your services rendered in behalf of those companies, what is the nature of this business that you speak of in placing other insurance with companies that you are not agents of?

278 A. That is in the nature of an insurance brokerage business.

Q. And you have been conducting this insurance brokerage business in the City of New York for how long a period of time?

A. Over 20 years.

Q. And in giving your testimony here with regard to your understanding of those terms that I have mentioned, embodied in the contracts of marine insurance, is that based upon those years of experience that you have mentioned?

A. It is based on the years of experience that I have had in every connection with the business of my firm and myself.

Mr. Potter:

In view of the answer just given by the witness, I move to strike out his entire testimony on the ground that he has shown himself not to be qualified to express the opinion which he attempted to state.

I move to strike out all the testimony given by this witness, so far as the policies in suit are concerned, on the ground that he has not been shown to be qualified; on the further ground that there is no claim made that the particular clauses to which he has referred are ambiguous, uncertain or peculiar; further on the ground that it is testimony concerning the contents of a written instrument; further on the ground that there
279 has no claim been made that these clauses cannot be readily understood; further on the ground that he has attempted to give opinions and conclusions concerning the very matters which the Court must determine; further on the ground that the witness has distinctly stated that he is an insurance broker, he has not claimed and as I understand it does not claim, to be an underwriter. Under these circumstances I will refrain from cross examining.

280 JAMES P. ROXEY, being duly sworn and examined as a witness for the libelant, testified as follows:

By Mr. Grace:

Q. Where is your place of residence?

A. Delanco, N. J.

Q. What is your occupation?

A. Marine superintendent of the Texas Company.

Q. How long have you filled that position?

A. 9 years.

Q. What is the nature of the business as marine superintendent that you are called upon to supervise, superintend and direct?

A. I superintend the operations of our fleet of chartered boats of all classes, tow boats, steamers, barges.

Q. About how many vessels or craft does the Texas Company own or operate?

A. 52.

Q. Among this number do they operate tow boats employed between American Gulf and Mexican Gulf ports?

A. They do.

Q. About how many of them?

A. At one time during my position there were two in service.

Q. The names of those tugs were what?

A. The Central American and the Pan American.

Q. And in addition to towage services performed by those tugs, are these two tugs you spoke of ocean going tugs?

A. Yes.

Q. Does that company engage in towing by means of its ships also?

A. Yes, sir.

Q. Does the Texas Company engage in towing vessels, outside of their own business, for a consideration, in other words towing contracts?

281

A. Yes.

Q. And the Texas Company has been entering into this character of contracts, that is with third parties for towage of vessels between American and Mexican Gulf ports for a period of how long, to your personel knowledge?

A. 9 years.

Q. You are at the head of the department that attends to the making of those contracts?

A. Not the head of it, sir, I am superintendant, there is a manager at the head of the department.

Q. In your capacity of superintendant, you have the supervising and directing of the particular contracts?

Mr. Potter:

Object to the question on the ground that it is leading, suggestive and improper in form; counsel for the libelant is quite able to ask questions which are not improper in form if he so desires; he has an exceptionally intelligent witness on the stand who is quite capable of stating what he does and does not do, and it is not necessary for counsel for the libelant to attempt to place words in his mouth.

No answer.

Q. In your experience as a superintendant of the maritime business of the Texas Company, does
282 your company engage in towing craft of third parties at the risk and hazard of the company, your company itself?

Mr. Potter:

I object to the question on the ground, first, that it is leading and suggestive; it is a statement of counsel; and on the ground it is incompetent; irrelevant; and immaterial; on the ground that what the Texas Company does do or does not do has no bearing whatsoever on the present controversy; further on the ground that no proper foundation has been laid for any evidence of this character; furthermore, no claim has been made that there is a custom of usage which is in any way binding on these respondents; further, that it is not the proper method or manner of establishing any such custom, if in fact any such custom or usage does exist.

No answer.

Q. In the contracts made by the Texas Company for the towage of vessels between American and Mexican

gulf ports, what is the designation therein, or terms therein with regard to at whose risk the tow shall be while in tow of one of your vessels?

Mr. Potter:

I object to the question first, on the ground that the witness' attention must be directed to a particular time or period; secondly, if it is attempted to direct
283 his attention to a particular contract, then I object to it on the ground that the witness has not yet stated that he had any familiarity with the contracts and in the next place if he does, then I object to it on the ground that the papers themselves are the best evidence; he cannot vary, offer, explain or testify concerning a matter which has been reduced to writing; testimony of this character is improper for those reasons; on the further ground, that it is incompetet, irrelevant and immaterial; on the further ground that usage or custom cannot be established in any such manner, shape or form.

A. At the risk of the vessel being towed.

Mr. Potter:

I move to strike out the answer on the grounds already stated.

Q. State whether or not that is the usual form of contract and custom that prevails between those ports with regard to towage contracts?

Mr. Potter:

I object to the question on the ground that the witness has not been shown to be qualified; secondly, on the ground that it has not been established that there was

any such custom or usage; thirdly, on the ground that if it is alleged that there was any such custom
284 or usage, it has not been shown that it was reasonably uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract in question; on further ground that it has not been shown that it was known to any of the respondents, or that it was so generally known as to raise a presumption that they had it in mind at the time the contracts of insurance here in issue were entered into.

A. You mean the wording of the contract?

Q. In other words I mean this—are those usual terms and conditions in contracts of towage between American and Mexican gulf ports, that the vessel being towed is towed at her own risk?

Mr. Potter:

I object to the question for the reasons already stated.

A. Yes, sir.

Q. Between what gulf ports do the vessels of the Texas Company perform towage services?

A. Port Arthur or Galveston to Tampico or Port Lobos, Mexico.

Q. New Orleans too?

A. New Orleans too, Mobile.

Q. In other words from all of the various gulf ports?

285 Mr. Potter:

Object to the question on the ground that it is a statement of counsel, leading and suggestive.

A. Yes.

Cross Examination.

By Mr. Potter:

Q. You have been the marine superintendent of the Texas Company for 9 years?

A. Yes.

Q. You are located here in New York City?

A. Yes.

Q. And you have been located here in New York City during those 9 years?

A. This is my headquarters, yes, sir.

Q. What is the general character of the work you do for the Texas Company, as marine superintendent?

A. Supervising the operation of their ships, preparing and approving charters, general marine work, repairs, loading and discharging.

Q. You have to do generally with the loading and discharging and the upkeep of the fleet, do you not?

A. And also supervising the electrical accounts and things of that kind.

Q. And your offices are located where?

A. 17 Battery Place.

Q. And you spend most of your time there?

A. Yes, sir.

Q. Occasionally you go out of town when one of your fleet gets in difficulties or something of that sort?

A. Well not necessarily difficulties, I am about half my time out of town in various ports where the ships touch.

Q. During this time when you are out of town, what is the nature of the work you are doing at that time?

A. The general upkeep of the ships, supervising the upkeep of the ships and work among the personnel of the crew.

Q. Do your duties are mainly in connection with the upkeep of the fleet, the operation of engines and the personnel of the ship?

A. Not personnelly, no, sir.

Q. Tell us what does occupy most of your time?

A. With the most of the time possibly in the direction of the ships from one port to another.

Q. What do you mean direction?

A. That is advising the various ports instructed as to when the ships will load for or their next voyages.

Q. To whom do you refer when you say the various ports instructed?

A. With the various ports in our company, the Refining Department, Sales Department, Traffic Department.

Q. What business is your company engaged in?

A. Engaged in the producing and manufacturing and transportation and sale of oil.

Q. And the company operates its own fleet?

A. Yes, sir.

Q. And the fleet carries the products of the [illegible] company?

A. Yes.

Q. Do that you have to do with the operation of that fleet?

A. Yes, sir.

Q. And the upkeep of the fleet?

A. Yes, sir.

Q. And the personnel of the fleet?

A. Yes.

Q. Is I understand it, you at one time had two ships in the fleet?

A. Yes.

Q. What was the tonnage [illegible] and the [illegible]?

A. [illegible] [illegible] [illegible]

Q. In what department are they prepared?
A. Marine department.
Q. By whom in the marine department are they prepared?
A. By myself, that is the direction of them.
Q. And who else?
A. Mr. Wagner.
Q. And what is the title of Mr. Wagner's office?
A. Marine Superintendent of Northern District, I think it is.
Q. Are these contracts ever passed upon by your legal department?
A. Yes.
Q. Who in the legal department has to do with that?
A. At the present time Mr. Garwood.
Q. And before the contracts are finally signed, they are passed upon by Mr. Garwood or someone in your legal department?
A. Someone in the legal department, yes.
Q. Your company does not make a business of towing in the Gulf?
A. That is not our regular business, no.
Q. You only do it occasionally?
A. Yes.
Q. You are not seeking that kind of business?
A. No, not especially, if it is offered and if it is convenient we take it.
Q. And if it is inconvenient you don't take it?
A. That is it.
Q. Do you recall any particular contract that was made for towing in the Gulf by the South American or Pan American?
A. The only particular one I recall is a towing from New Orleans to Colon.

Q. And about when was that?

A. 1921, August 1921 I think it was.

Q. Do you recall any particular contract ever made for any tug or steamer of your fleet for towing from Tampico to Galveston and from Tampico to Freeport?

A. I don't recall just now.

Q. You were asked to come here and give your testimony by Mr. Grace, were you not?

A. Yes, sir.

Q. And when did he first speak to you about it?

A. Mr. Harleour asked me yesterday.

Q. And Mr. Harleour told you that he was interested in certain litigation pending in the South?

A. He mentioned that some litigation with reference to the loss of a tug or barge, I don't recall which it was now.

Q. And he asked you to come and give your testimony here?

A. Yes.

Q. About what time of the day did he talk with you about it?

A. Between 10 and 1, I couldn't designate the hour.

Q. Yesterday?

A. Yesterday forenoon I suppose it was.

Q. After he talked with you, did you examine any contracts which had ever been made by your company for towing?

A. No, sir, I did not.

Q. You wouldn't attempt to say in testifying here this morning that you had any particular contract ever made by your company in mind?

A. No, sir, I wouldn't.

Q. You are simply testifying as to your own general impressions?

A. Yes.

Q. And that has too in mind the work which was done by your tugs down there prior to 1919?

A. Yes.

Re-Direct Examination

By Mr. Grace:

Q. And you had in your mind also, did you not, the work done by your steamships right down to the present time?

Mr. Potter:

I object to the question on the ground that it is not proper re-direct examination, leading and suggestive, it is a statement of counsel rather than testimony of the witness.

291 Mr. Grace:

I suggest that the last question put by the learned counsel for the respondents was putting words into the witness' mouth, limiting his testimony.

Mr. Potter:

I call counsel's attention to the fact that it was cross examination and not direct or re-direct examination, and as is well known by counsel for libelant, the rules of evidence are entirely different and distinct.

292 EXHIBIT, LIBELANTS, EX. A.

Filed May 31, 1926.

This letter sent to:

Talbot, Bird & Company, 63 Beaver.
Globe & Rutgers, 111 William.
Wm. H. McGee & Co., (Phoenix), 15 William.
Firemans Fund, 72 Beaver.
Carpinter & Baker, 3 South William.
Vessel Agency, 43 Exchange Place.

Loss.

June 9th, 1922.

Tug Wash Gray in tow. Assured Compania de Navegacion Interior S. A. and/or Clyde A. Barbour.

Gentlemen:

We regret to advise you that we are this morning in receipt of a telegram from our correspondents in Housfon, Texas, dated June 8th, advising us that the tug Wash Gray sunk at 11 o'clock yesterday morning one hundred miles south of Freeport, Texas.

Kindly acknowledge receipt of this preliminary notice and if you desire us to take any immediate steps in the matter of retaining the services of underwriters agent or surveyor to protect your interests kindly advise us.

In the meantime we are writing for further particulars.

Very truly yours,

WILLIAM H. YOUNG & COMPANY,

By .....

Sent a copy of this to A&P Houston.

293 LIBELANTS EX. "A-2," FROM WILLIAM H. YOUNG & CO. TO NEW YORK BOARD OF UNDERWRITERS.

Filed May 31, 1926.

Sent a copy of this to A&P Houston.

Loss.

June 9th, 1922.

Tug Wash Gray, in tow. Assured Compania de Navegacion Interior S. A. and/or Clyde A. Barbour.

New York Board of Underwriters,
35 South William Street, N. Y. C.

Gentlemen:

We are advised by telegram dated June 8th, that the tug Wash Gray in tow from Tampico, via Freeport to Galveston, was lost at 11 o'clock yesterday morning about one hundred miles south of Freeport.

We have communicated this information to the interested underwriters. They are as follows:

Talbot, Bird & Company.
Clobe & Rutgers.
Wm. H. McGee & Co., (Phoenix).
Fireman's Fund.
Carpinter & Baker.
Vessel Agency.

If you desire us to take any immediate steps in this matter will you please advise us. If the underwriters desire to retain the services of your agent or surveyor

for the purpose of investigation will you be good enough to let us know whom you appoint so that we may keep in touch with him.

Very truly yours,

WILLIAM H. YOUNG & COMPANY,

By .....

294 LIBELANT'S EXHIBIT "A-3," LETTER FROM THE BOARD OF UNDERWRITERS OF NEW YORK TO MESSRS. WILLIAM H. YOUNG & CO.

Filed May 31, 1926.

(Letter head of):

The Board of Underwriters of New York.

June 9, 1922.

Loss—Wash Gray.

Messrs. William H. Young & Co.,
27 William St.,
New York.

Gentlemen:

Your letter dated June 9th, informing us of the casualty to the Tug "Wash Gray" and giving us a list of the interested underwriters was received.

We immediately circularized these underwriters and were instructed by them to telegraph Mr. Beers, as follows:

"Our underwriters interested tug Wash Gray which tug while being towed from Tampico via Freeport to Galveston was reported lost one hundred miles south Freeport investigate and report protecting interest."

As soon as we receive any definite information from our correspondent we shall be pleased to hand you a copy of same.

Yours very truly,

BENJ. MERHLEN, JR.,
Asst. Secretary.

BM/RW

(The above signature stamped with rubber stamp.)

P. S. Kindly let us have the amounts of interest of the companies listed in your letter addressed to us.

295 LIBELANTS EXHIBIT A-4, LETTER FROM THE VESSEL AGENCY INC. TO MESSRS. WILLIAM H. YOUNG & COMPANY.

Filed May 31, 1926.

Letter Head of The Vessel Agency, Inc., New York City.

June 9th, 1922.

Messrs. William H. Young & Company,
27 William St.,
New York City.

Gentlemen:

Tug "Wash Gray."

We have your letter of the 9th reporting that the Tug "Wash Gray" sunk at 11:00 o'clock on the morning

of June 8th, 100 miles south of Freeport, Texas. We further understand from your telephone conversation today that the matter has been reported to the National Board. As soon as you have further particulars we would appreciate your advising us.

Very truly yours,

(Signed) M. M. PEASE,
Assistant Manager.

MMP-Z

296 LIBELANTS EXHIBIT "A-5."

Filed May 31, 1926.

June 20, 1922.

We acknowledge receipt of your letter of June 19, 1922, enclosing proof of loss in connection with the tug Wash Gray, also the following papers enclosed therein:

Protest.

Extended protest.

Copy of Agreement between the Freeport Sulphur Company and C. A. Barbour.

Certificate of registry under Mexican Flag.

Sworn statement of C. G. Hasland, Master of the Freeport Sulphur No. 1.

Phoenix Ins. Co., (Original Papers), Wm. H. McGee & Company, Genl. Agents. * 6/20/22.

Fireman's Fund Insurance Co. RAB 6/20/22.

Western Assurance Company, London, Liverpool & Globe, National Liberty; Carpinter & Baker. C. & B. 6/20/22.

Globe & Rutgers Fire Ins. Co. Documents received G. & R. 6/20/22.

Franklin Fire Ins. Co., Springfield F. & M. Ins. Co.; Talbot, Bird & Company. Documents received (2) F F In 6/20/22.

Hartford Fire Ins. Co., Northwestern F. & M.; Vessel Agency. The Vessel Agency Inc., A. G. Giefoy, Cashier.

297 Return for Registered Article. No. 326347. Registered at Post Office indicated Postmark. Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry.

New York, (Wall Street Station), N. Y. June 21, 1922.

Postmark clearly showing date and office.

Postmasters.

Per .....

(Stamped in Purple Rubber Stamp as above.)

298 RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article the original number of which appears on the face of this Card.

(Sgd.) AETNA INSURANCE CO.

(Signature or name of addressee.)

PLATO.

(Signature of addressee's agent.)

Date of Delivery 6 22 1922.

Hartford, Conn. Registered. Jun-22-1922.

(The above stamped in rubber stamp.)

(On Reverse on Return Receipt.)

Post Office Department.

Official Business.

Registered Article.

No. 326347

Insured Parcel.

No. .....

Penalty for private use to avoid payment of postage $300.

66.

Postmark of Delivering Office: Hartford, June 22, 1922, 11 p. m., Conn. And Date of Delivery.

Return to Wm. H. Young & Co.

Street and Number or Post Office Box: 27 Wall St. New York, New York.

299 LIBELANTS EX. "A-6."

Filed May 31, 1926.

Registered Mail.

June 20 22.

Tug Wash Gray, Compania de Navegacion Interior, S. A. and or C. A. Barbour.

Aetna Insurance Company,
Hartford Conn.

Gentlemen:

On June 9th we notified Talbot, Bird & Company of this loss, also notified the Board of Underwriters of New York.

We now have proof of loss documents and other papers and sent them to Talbot, Bird & Company, who advise us that they should be sent to you direct at Hartford. We are, therefore, enclosing them herewith by registered mail and would ask that you kindly give same your attention and let us have check in payment.

Thanking you, we are

Very truly yours,

WILLIAM H. YOUNG & COMPANY,

By .....

Enclosures:

Proof of Loss.

Protest.

Extended protest.

Copy of agreement between the Freeport Sulphur Co. and C. A. Montague.

Certificate of Registry under American Flag.

Sworn statement of C. G. Haviland, Master of the Freeport Sulphur No. 1.

200 DEPOSITIONS OF WILLIAM H. VOSBURG, AND HENRY A. ADAMS, ON BEHALF OF LIBELANT.

Filed May 31, 1926.

(Title omitted.)

Depositions taken on behalf of the libelant at the office of Messrs. Adams & Peters, 27 William Street, New York City, May 18th, 1926.

Appearances:

Messrs. Hunt, Hyland & Hunt.

Messrs. Bigham, Englar & Jones, (Mr. Jones and Mr. Englar) for respondents.

Messrs. John St. & W. A. Gleason, (Mr. John St. Gleason) for the libelant.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable, copy to be served on opposing counsel.

WILLIAM H. [illegible] sworn, on a witness on behalf of the Union, testified as follows:

By Mr. Green:

Q. Mr. Young, when you were on the stand as a witness on behalf of the respondents you were asked with respect to the case of Coleman against Allen, decided in the Circuit Court of Appeals, Fifth Circuit, determined on or about May 7th, 1917, and were asked whether or not you or your firm or any of the members of the firm had been interested in placing any insurance in that case. Having had an opportunity to examine that particular case, I would ask you now to state what it is that Allen & Porter and present associates and counsel have claiming the connections had in that case with respect to the placing of the insurance?

Mr. Brought:

Objected to on the ground that the witness has previously testified that neither he nor his firm placed the insurance or acted as brokers in that case and that accordingly the testimony in answer to the question just asked is immaterial, incompetent and incompetent and hearsay.

A. I believe that I did not quite recall at that moment anything in connection with the placing any insurance for the Allen Construction & Trucking Company. I think I have testified that upon thinking it over it was quite likely that I did have something to do with it because as I did know that the placed insurance for those people, but as to whether it was in 1917 or not I didn't quite recall at the time. I would now that Allen & Porter placed or rather accepted insurance for the Allen Con-

struction & Towing Company on some vessels to be towed across the Gulf in 1912, acting if I remember rightly at that time as agents of the St. Paul Fire & Marine Insurance Company. I believe that one or more of these barges were lost on the voyage I am speaking of and again acting as agents of the insurers, I believe that Adams & Porter paid the Cluny Construction Company the amount of loss shown to be due under the policies which Adams & Porter issued as agents—shall
302 I continue?

Q. Yes.

A. Then from further thought on the matter and a little investigation, I recall that the St. Paul Fire & Marine Insurance Company after having paid the loss took subrogation—or they took subrogation at the time the loss was paid, then, as the attorney says, looking into the rest of the case and examining into it I find that the St. Paul Insurance Company appeared to have assigned their claim over to Eugene J. F. Coleman whom I happen to know is or was at that time an underwriter for William H. McGee & Company of New York general agents, marine department of the St. Paul Fire & Marine Insurance Company, and apparently Mr. Coleman acting for them proceeded against the towing vessel which, if I recall properly, was the Monarch. The rest of it I have no definite knowledge of.

Mr. Brengle:

I move that the answer be stricken out on the ground stated in the objection and on the further ground that it appears from the answer that the witness has no personal knowledge of any of the facts purported to be stated in the answer.

Q. Mr. Young, on each of the policies written on the Wash Gray, a rider was attached stipulating that the

towage service to be performed by the steamship Freeport Sulphur No. 1 and, as otherwise stated in that rider and in each one of those riders attached to each one of the policies, there is a provision for a further payment of one-eighth percent premium, will you kindly
305 state what that additional one-eighth percent premium was paid for?

A. When the risk was first presented to underwriters it was contemplated that the voyage would be made direct from Tampico to Galveston and at that time it was contemplated it would be made about February or March, which is prior to the socalled hurricane season. When the trip was actually made or rather when the insurance came up more definitely later on the season had advanced very materially into what is called by some underwriters the hurricane season, also the actual trip as it was presented finally called for a port of call at Freeport rather than a direct voyage, and privilege was granted to make this call and to stay there until the Wash Gray was towed to destination at Galveston by an approved tug, therefore for both the reason of this call at Freeport and for the advance into the so-called hurricane season, this additional rate of one-eighth percent was charged.

Q. With respect to the reports that have been made by Mr. James T. Taylor as one of the surveyors designated in some of the policies and with respect to the report made by Mr. Verne Dyer the other surveyor who acted in this case, were those reports made by these two gentlemen submitted to each and every one of the underwriters before they executed policies of insurance on the Wash Gray?

A. Their original telegrams were so submitted.

Q. And with regard to the written report?

A. I don't recall whether they were or not.

304 Q. But you said something about telegrams?

A. The telegrams positively were reported to each and every underwriter prior to the issuance of the policies, and the original of each telegram was initialed by a representative of each and every underwriter and a copy of each telegram was left with each and every underwriter at that time.

Q. With respect to the record of the Wash Gray, is there any standard work used and frequently referred to by underwriters in which there is any record of the steamer Wash Gray?

Mr. Brengle:

I object to the question as immaterial, irrelevant and incompetent.

A. Yes, there is.

Q. Would you just simply name the report or publication?

A. It is published by the Government and called List of Merchant Vessels of The United States, commonly known in our business as the Blue Book.

Q. Which described the general features of the vessel itself?

A. Well, it describes—

Q. Such as her size, dimensions, power and so on?

A. Yes, sir.

Cross Examination.

By Mr. Brengle:

Q. Mr. Young, did you personally submit to or show to the underwriters who issued policies on the

305 Wash Gray, or the representatives of those underwriters, the telegrams to which reference has been made from the two surveyors in Mexico?

A. I know positively that I did to some of them, but I can't say that I personally presented it to all of them.

Q. You don't recall to which ones you personally showed the telegrams?

A. I recall some of them, yes, sir.

Q. Will you name the ones to whom you personally showed them?

A. Yes, sir, to Talbot, Bird & Company, to the Fireman's Fund Insurance Company and to the companies represented by William H. McGee & Company, I recall personally taking the telegrams to those offices but I cannot recall definitely whether I took them to all of the others or not, I think I did but I can't swear to it.

Q. Reference has been made to the case of Coleman against Aiken and I understand you to testify that the St. Paul Fire & Marine Insurance Company had issued policies covering the barges of the Cluny Construction Company which were insured by the St. Paul Fire & Marine Insurance Company, do you know whether at the time of the issuance of the policy which the St. Paul Fire & Marine Insurance Company wrote on those barges or prior to the issuance of that policy, whether the owners of the barges had disclosed to the St. Paul Fire & Marine Insurance Company the fact that the barges were to be towed under any particular form of
306 towage contract?

A. I don't recall it.

Q. As far as you know it may have been true that the St. Paul Fire & Marine Insurance Company at the time it wrote the policy knew all about the form of the towage contract, what the towage contract provided?

A. I know very little about the actual placing of that insurance, Mr. Brengle.

Q. You don't know as a matter of fact that the St. Paul Fire & Marine Insurance Company at the time it wrote the insurance was ignorant of the terms of the towage contract?

A. No, sir; I don't know one way or the other.

Re-Direct Examination.

By Mr. Grace:

Q. Is there any member of the firm who is apt to know more concerning that matter than yourself?

A. I think there is.

Q. Who would that be?

A. Mr. Adams.

307 HENRY A. ADAMS, being duly sworn and examined as a witness for the libelant, testified as follows:

By Mr. Grace:

Q. What is your present occupation?

A. Marine insurance agents and brokers.

Q. Where is your place of residence?

A. Darien, Connecticut.

Q. How long have you been engaged in the business of insurance brokerage, marine insurance particularly?

A. About 25 years.

Q. Do you recall anything of the loss of two barges that were in tow of a tug belonging to the Aiken Company of Florida, the barges belonged to the Cluny Construction & Towing Company of Lake Charles, Louisiana, respecting the loss of those two barges on the Gulf while in tow of the tug?

A Yes, I remember such a risk.

Q. It appears that in that same risk that later on there was litigation in which Mr. Coleman was the libelant against the Aiken Company, that is the one you had in mind for the loss of the Cluny barges on the Gulf?

A. Yes.

Q. Will you tell us, Mr. Adams, what it is that you recall personally respecting the placing of that risk and the subsequent events that followed as you recall it?

A. Well, it is a little bit—

308 Mr. Brengle:

I object to the question as immaterial, irrelevant and incompetent, as calling for testimony that has no bearing on or connection with any of the issues involved in the present litigation, as calling for testimony that is not binding in any way on any of the parties to this litigation.

A. Well, it was about 12 or 15 years ago, we were agents for the St. Paul Fire & Marine Insurance Company in Houston, Texas, and were doing considerable business for the Cluny Construction & Towing Company, and these barges in tow for Tampico were offered to us to place at the best rates and conditions, same as we had been doing the rest of their business and we sent the business for acceptance to the general agents of the St. Paul in New York, William H. McGee & Company, of which Mr. Coleman was the active underwriter, and having received his approval to take the business, we accepted it and later on were notified that the barges were cast adrift owing to the fact that the towing vessel had run out of coal and could not recoal from some supply she had stored on one of the barges, and then the Cluny Construction Company made claim through us against the company and the company, while feeling

that the assured were not responsible, they paid the loss and took subrogation against the owners of the tug and from that point on the matter was handled directly by the St. Paul Company. I am not familiar with anything after that except from hearsay.

309 Q. At the time that you were asked by the Cluny people to place insurance on those two barges, did they submit to you a towing contract they had with the Aiken Company?

Mr. Brengle:
Same objection.

A. No, sir.

Q. Therefore you did not submit to the New York agents here to whom was put up the final question of acceptance, the contract of towage?

Mr. Brengle:
Same objection.

A. No, sir.

Q. And so far as you know, the St. Paul Fire & Marine Insurance Company, the insurers in that case, knew nothing about the contract that existed between the Aiken Towboat concern and the Cluny concern?

Mr. Brengle:
Same objection.

A. They knew nothing except the bare facts of the risk which I have set forth previously.

Q. Now it appears that in that contract between the Aiken people and the Cluny people there was a provision to the effect that the towing company should in

no way be held responsible for the barges—what have you to say with respect to such a provision in a towing contract in relation to customs and usages which prevail on the Gulf of Mexico in towage services?

310 Mr. Brengle:

I object to that question on all of the grounds stated in the objections to the previous questions; on the further ground that it is improper for examining counsel to state or purport to state the substance of a written contract in another case, which written contract has not been offered to be put in evidence; on the ground that the questions calls for hearsay testimony, for the opinion of the witness, for the witness' legal opinion on a legal instrument which has not been submitted in evidence, which is not involved in this case; on the ground that it calls for expert testimony on matters on which the witness has not been qualified as an expert; and generally on the ground that the question calls for testimony which is admitted to violate every known rule of evidence except the rule in regard to dying declarations.

A. All towing contracts that I ever heard of and those I have seen, which are a few, the towing vessel is always relieved from any liability to her tow, that has been the custom always that I have ever known in the Gulf and all my marine insurance business practically has been in the Gulf.

Mr. Brengle:

I move that the answer be stricken out on all the grounds stated in the objection and on the further ground that it is not responsive, that it shows that it is

311 based on hearsay; on the further ground that the witness has purported to testify as to the practice and customs in the towing business, whereas the witness is not engaged in the towing business.

Q. But you are and have been as I understand for a long time engaged in the business of accepting risks concerning towing contracts?

A. Yes, in the last 25 years I expect I have insured 2000 tows at least in the Gulf.

Cross Examination.

By Mr. Brengle:

Q. Mr. Adams, have you ever placed towers liability insurance?

A. Yes, sir.

Q. Have you placed much of it?

A. Quite a good deal.

Q. Will you state what tower's liability insurance is?

A. Tower's liability insurance is to protect the owner of a towboat against liability that his boat or his tow may have against other vessels which they collide with.

Q. Tower's liability insurance also protects the man who holds it against legal liability to the towed vessel or to the owner of a towed vessel, does it not?

A. Yes, sir.

Q. What is the use of tower's liability insurance in so far as liability of the towing vessel to the towed vessel is concerned, if such liability is always cut off by the contract?

A. It is not always cut off by contract, only in exceptional or unusual tows. Ordinary tows there are no

special contracts made, an ordinary towage vessel with tower's liability contract is generally for inside
312 harbor work, shifting vessels around, promiscuous towing—a regular towing contract is not made for those tows.

Q. So that you would say that the case in which a written towage contract is made is an extraordinary or unusual case?

A. In the Gulf, yes.

Re-Direct Examination.

By Mr. Grace:

Q. Mr. Adams, by that answer did you mean that it is anything extraordinary or unusual where towage services are rendered on the Gulf for that provision to be contained in it?

Mr. Brengle:

I object to the question, the witness has already answered fully, his answer needs no qualification or explanation.

Mr. Grace:

We submit that the witness has distinguished in an answer preceding where he considered tower's liability to attach, that is to say in ordinary work which he has characterized as work done in and around the harbor, but we do not concede that his answer intends to convey the idea that contracts for towage out on the Gulf are entered into only on extraordinary occasions, so therefore for the purpose of clarifying the situation, if any misunderstanding may attach by reason of what has been said, we ask the witness to keep apart in his mind har-

bor services from the services performed out-
313 side, that is to say out on the Gulf, and to state whether or not is or is not the custom and practice whether a contract be in writing or not, where towage services are performed or to be performed out on the Gulf, whether or not it is the custom and practice that the towing vessel should be relieved from responsibility for damages that may be occasioned the towing vessel, howsoever happening.

Mr. Brengle:

Counsel for the respondents objects most strenuously to the action of counsel for the libelant in attempting to characterize an answer of the witness, and the action of counsel for the libelant in instructing the witness to distinguish between certain things. Counsel for respondents further objects to statements on the record by counsel for libelant as to what he does or does not concede. Counsel for the respondents insists that this examination proceed in the ordinary and customary manner of question and answer.

Mr. Grace:

We submit that the question as propounded is under the circumstances full and completely admissible under the rules of evidence, and ask the witness to proceed with his answer.

314 Mr. Brengle:

Counsel for the respondents has no objection to the propounding of questions to the witness, but does object to cluttering the record with improper statements of counsel.

Mr. Grace:

We submit that counsel for the respondents is as much confused in his assumption of what the law is as

he is in using the terms counsel for the libelant and counsel for respondent, we again ask that the witness shall answer or explain as requested by counsel for the libelant.

Q. (Repeated): Mr. Adams, by that answer did you mean that it is anything extraordinary or unusual where a towage service are rendered on the Gulf for that provision to be contained in it?

A. I don't quite understand the question but as I thought I had already said it was customary for out side and extraordinary towage risks for the towboat to have a release from any liability to her tow and on all those outside risks special contracts were always entered into against them, as I have answered on inland and harbor risks there never was any contracts for the short tows.

Mr. Brengle:

I move that the answer be stricken out on the grounds stated in the objection; also on the further ground that the answer is obviously based on hearsay.

Q. Mr. Adams, taking into consideration particularly towage service with respect to the towing of the Wash Gray from Tampico to Galveston by way of
315 Freeport, how do you characterize that character of service?

Mr. Brengle:

I object to the question on the ground that it is wholly useless, it being wholly immaterial to any issue involved in this case how the witness characterizes anything.

A. In our business of insuring vessels, we call all risks of that nature as extremely hazardous.

316 TESTIMONY FOR LIBELANT.

Filed May 31, 1926.

(Titles Omitted.)

317 Testimony taken in the above entitled and numbered cause on behalf of Libelant, before R. H. Carter, Commissioner herein, on the 6th day of January, 1926, at the office of Messrs. J. D. and M. A. Grace, Hibernia Bank Building, New Orleans, Louisiana.

Appearances:

Messrs. J. D. and M. A. Grace, (Mr. John D. Grace), for Libelant.

Messrs. Dart & Dart, (Mr. Henry P. Dart, Jr.), for Respondents.

318 Stipulation:

It is hereby stipulated and agreed between Counsel, that this testimony shall be taken down by a stenographer, and transcribed on the typewriter, signing, sealing, filing and certification being waived, copy of the testimony to be furnished opposing Counsel, stenographic fees to be a taxable disbursement.

LESTER F. ALEXANDER, witness, being duly sworn and examined on behalf of Libelant, testified as follows:

Direct Examination.

By Mr. Grace:

Q. What is your name?

A. Lester F. Alexander.

Q. Captain Alexander, where do you live?

A. New Orleans, Louisiana.

Q. What is your occupation with respect to maritime affairs?

A. Maritime contracting and towing.

Q. How long have you been engaged in that business?

A. I have been in the business for myself about fifteen years, and was indirectly in the business ten years before that.

Q. Covering a period of say twenty-five years?

A. Yes, sir.

319 Q. Between what ports and places have you operated in carrying on that business?

A. I operate tugs and barges, derricks and pile drivers.

Q. You have been engaged in the towing business about twenty-five years between what ports and places, out of what ports and places?

A. I have not been that long in the towing business.

Q. How long have you been in the towing business?

A. About ten years in the real towing business, I operated tugs before that.

Q. And you have been operating tugs during the last ten years in the towing business between what ports and places?

A. Between New Orleans, Mobile, Pensacola, St. Joe, Florida, Tampa, Key West, Miami, Jacksonville, Philadelphia, New York, Galveston, and Tampico, Mexico, and Bluefields, some place down there, Bluefields I think, I made a couple of tows for the Cuyamel Fruit Company down there, also to Houston, Beaumont and Port Arthur.

Q. In that line of business, your particular headquarters is in what city?

A. New Orleans, La.

Q. And at what other ports and places have you tugs that are operating outside of New Orleans?

320 A. We have tugs in Miami and I believe we are fitting up now to go to Tampa, but we are not sure yet.

Q. Is this the schedule of towing rates issued by your company, the Lester F. Alexander Company?

(Counsel hand witness document and witness examines same.)

A. Yes, sir.

Q. Is that in its general tenor similar to schedules and conditions issued by other towing companies throughout the Gulf Coast?

A. Yes, sir.

Q. For how long a period of time has the various tow boats companies operating in and out of the gulf ports to American ports, Mexican ports, etc., sent out these schedules indicating the terms and conditions for their towage, etc.?

A. I am not quite sure but I think this was sent out the first part of 1918.

Q. Prior to this uniform schedule that has been existing, what had been the usual general custom which prevailed between American gulf ports and Mexican gulf ports with respect to the question of losses that might arise to the tow during the towage service, and we refer of course to the question of liability of the towing tug?

321 A. We were only in the towing business some three or four years prior to the time this schedule or the preceding ones were gotten out.

I notice on the heading here that this schedule cancels the schedule of October 1, 1920, and our policy was then that the tow took care of itself and we were responsible for our tug and they were responsible for the tow. Each one of the towing companies I think handled more independently then, each one handled their business as they saw fit, but our idea was that the tug had nothing to do with the responsibility of the tow.

Q. In the event that the tow should be lost by reason of any cause whatsoever, including say negligence of officers or crew of the tug boat, what was your position during all the time you have known of towing on the gulf, with respect to the question of liability in that case?

A. This schedule here says: "All towing is done at the risk of the tow." Naturally the tug nor owners shall be responsible for any damage done to the tow through negligence; and the masters and crews of tugs, in the performance of the towage service shall become the servants of, and identified with the vessel or the
322 craft towed." This is the general idea we always had, as well as in many cases where we had outside tows from New Orleans to Galveston, from New Orleans to New York, or from New Orleans to Tampico, we drew up a special agreement as to prices and conditions. I think in most of our cases we add in there this clause that no responsibility for any cause whatsoever attached to the tug, owners, masters or crew.

Q. In the event of any loss or damage to the tug?

A. Yes, sir.

Q. Can you give an illustration of why it is that the towing concern, and why it has been all through these years, why the towing concern taking any large valuable tows would not assume any risk or hazard with respect to loss or damage to those tows, no matter how occurring?

A. We take a ship from here to Galveston say for $1500 or $2000, and from here to Mobile sometimes for $1100. I think we have towed them for $900. That ship may be worth $250,000. Our profits on that tow is very small, if any, in some cases, and we cannot assume a liability of $250,000 or any part thereof, merely for the purpose of getting a tow for $2,000. We would have to let the business go, it is not worth the money.

323 Q. It is because of that reason principally then that operators of tugs decline to assume any responsibility whatever with respect to the tow?

A. They feel they are in the towing business and not in the insurance business.

Q. Have you had vessels of your own also towed?

A. Yes, sir, some.

Q. And where you took out the regular marine insurance against maritime risks, have you always considered that your policy of insurance covered a loss to your barge that would be in tow of another vessel, where that loss might be occasioned by some negligence or fault on the part of the tug doing the towing.

A. We always felt we were covered on that policy for anything that it did not specifically state, for any cause whatsoever, unless due to violation of conditions stated in the policy.

Q. Did you, so far as you have known, in your years of experience, find or determine, or be advised by the Underwriters, or otherwise, that that policy in its general terms against maritime risks, would not cover losses arising from negligence of officers and crew of the towing vessel, unless specifically specified?

324 Objection: Mr. Dart:

We object to that question as calling for a conclusion of law.

A. We never were advised to that effect.

Offer: Mr. Grace:

The schedule with respect to which the witness has testified, is offered in evidence in connection with his testimony, and for purposes of identification is marked Libelant Exhibit-Alexander-1.

Q. Are you still in the towing business?

A. Yes, sir.

Q. Between the ports and the places you have designated?

A. Not regularly, but we obtain tows for those places.

Q. In other words, you were open for their business?

A. Yes, sir, for those ports.

Cross Examination.

By Mr. Dart:

Q. As I understand, you write into all of your towing contracts, or make it a condition of your towing contracts, that all towing is done at the risk of the tow?

A. That is our intention in all our contracts.

Q. Should you not have a written contract, it is your intention that that work should be done subject to that condition, is that correct?

A. Yes, sir.

325 Q. In other words, it is a matter of contract between you and the people for whom you do the towing, is that correct?

A. Yes, sir. They can refuse any condition we want to put in, if they so wish it. It is a matter of contract.

Q. In other words, when a man applies to you to tow his vessel, you make it a condition of the contract that the work shall be done at the risk of the vessel being towed. That is correct, is it?

A. No, we make it a condition that the tug is not liable, or its owners, master or crew. They can place

their risk where they want is what I mean. We do not interfere with their towing but we eliminate the tug from responsibility, its owners, master and crew.

Q. Do you have a written contract in every case of towing you do?

A. All that I handle personally. I am not sure when I am away sometimes what they do.

Q. It is usually covered by a letter or agreement?

A. Yes, sir.

Q. Do you always put in that letter or agreement, when you are here I mean, the clause that is shown on your schedule here?

A. No, sir.

Q. Why don't you?

326 A. I usually write in there that the tug, its owners, master or crew, is not responsible for loss or damage from any cause whatsoever. Writing in "any cause whatsoever," makes it sure and covers everything.

Q. In other words, if the barge or whatever it was being towed was sunk through the negligence of your tug boat, you would not be responsible, is that correct?

A. Yes, sir.

Q. If the barge or other vessel being towed was sunk through the unseaworthiness of the tug boat, you would not be responsible?

A. No, sir.

Q. If the barge was sunk through the negligence of navigation of the tug boat, you would not be responsible?

A. We would so claim.

Q. That is what I mean?

A. Yes, sir.

Q. In other words, no matter what the cause of the loss was, the owners of the barge or other vessel you were towing would have no recourse against you?

A. That is our intention.

Q. And that is part of every contract you make?

A. Unless I make an oversight and don't get it in. It is my intention to do so.

Q. And you so notify the public in your schedule of towage rates, by printing it in your sched-
327 ule?

A. We mail that schedule to all of our customers by registered mail and ask for a return receipt.

Q. So when they ask you to do any towing work, they know you only undertake the work under those towing conditions?

A. Yes, sir.

Q. You don't pretend to say do you, that in the absence of such an agreement you would not be responsible for the negligence of your servants?

A. We think under the general terms of towing we are. We realize, however, that we might have an argument about it, and try to eliminate that argument in advance.

Q. You don't pretend to say, do you, that if you did not have such a contract as this, and through the carelessness and negligence of the crew of the tug the barge was sunk, that you would not be responsible?

Objection: Mr. Grace:

Objected to on the ground the witness has already answered that question and has stated that the understanding among the tug boat men and general operating of tug boats in the Gulf, for a long period, had been that they were not responsible. It has been the general understanding and custom.

A. We would deny liability under the generally ap-
proved custom of the tow boat owners in the
328 Gulf.

Q. Do you mean to say, as a matter of law, if you had no contract at all, that you, the owner of the tug, would not be responsible for the negligence of your servants in case of loss of a vessel being towed?

A. May I elaborate just a little bit on that answer?

Q. Certainly?

A. If I felt I was going to be liable for loss to any tow that we would make, I would go out of the towing business. I would not invest money at all in tugs if we felt we would be liable for the tows. It don't justify the risk.

Q. If, as a matter of law, you were not responsible for loss caused by your negligence, in the absence of a contract, what is the object of having a condition or clause like this put in your contracts?

A. As a matter of law, I don't know.

Q. It is to get around your legal liability, is it not?

A. My idea in putting it in there is to establish a definite understanding, and not to have squabbles, and arguments and law suits thereafter about something that we did not want to assume.

Q. In other words, to make it absolutely clear and certain that you do not undertake any tows unless it is understood that you assume no risk whatsoever in case of loss or damage to the vessel being towed.

329 Is that correct?

A. That is correct, that is our idea in putting that in there.

Q. In other words, suppose one of your competitors like the Bisso Towing Company wanted to assume the risk of legal liability in case of accident to the vessel being towed, that would be a matter that is up to him?

A. It is within his contractural rights, as I see it.

Q. So far as you are concerned, you never assume the risk of legal liability?

A. Not if I know it. I may have sometimes.

Re-Direct Examination.

By Mr. Grace:

Q. You were asked about what Mr. Bisso might be at liberty to do. If Mr. Bisso saw fit to make full and complete title to each and every one of his tugs over to anybody he saw fit to give them away to, he could do that too, could he not?

A. He could do that too. His family might object.

330 TESTIMONY FOR LIBELANTS, AND EXHIBIT, BEING EXTRACT FROM ENGLISH HARBOR BOOK READ INTO THE RECORD.

Filed May 31, 1926.

(Titles Omitted.)

331 Testimony taken in above entitled and numbered causes before Reginald H. Carter, Commissioner, on the 6th day of May, 1925, at the offices of Messrs. J. D. & M. A. Grace, Hibernia Building, New Orleans, Louisiana, said testimony being taken on behalf of Libelants.

Appearances:

Messrs. J. D. & M. A. Grace, (Mr. J. D. Grace), Proctors for Libelants;

Messrs. Dart & Dart, (Mr. Hy. Dart, Jr.), Proctors for Respondents.

332 Stipulation:

It is stipulated and agreed between Counsel that the testimony of the witness may be taken down in

shorthand and transcribed on the typewriter, signing, sealing, filing and certification waived, stenographer's fees to be a taxable disbursement, copy of testimony to be furnished opposing Counsel.

R. D. REEVES, being duly sworn on behalf of Libelants, was examined and testified as follows:

Direct Examination.

By Mr. Grace:

Q. What is your name?

A. R. D. Reeves.

Q. What is your place of residence?

A. New Orleans.

Q. What is your occupation?

A. Vice President and General Manager of W. G. Coyle & Co.

Q. What is the kind of business conducted by them?

A. Coal and towing, that is wholesale and retail, I mean bunker and export coal and the operation of tug boats.

Q. And what character of towage service is performed under your direction by Coyle & Company?

A. All kinds, including sea, harbor, river and wrecking work.

Q. How long have you been identified with the business of the operation of tugs particularly, as well as that of coal business?

A. About ten years. It will be ten years in August.

Q. During this period of say ten years have
333 you had much to do with respect to outside, that is Gulf and Ocean, towage?

A. Yes, sir; we have had quite a lot of that work right along in the last seven or eight years.

Q. And during that last seven or eight years how many and what character of towboats have you been operating as manager of that company?

A. Right now we have seven tugs, five of them are seagoing tugs. We have under operation practically all the time from two to seven. These tugs range in horsepower from five hundred or six hundred to sixteen hundred. At present we own the tug Adler which has sixteen hundred horsepower and the tug Sipsey which has twelve hundred horsepower, the tug DeBardeleben which has eleven hundred horsepower and other tugs of less horsepower.

Q. And what kind of craft is it that you have performed towage services for, particularly on the outside?

A. Ships and seagoing barges, sometimes sailing vessels.

Q. In the rendition of towage services with respect say to voyages between American Gulf Ports and Mexican Gulf Ports, or vice versa, what is said about, or what is the agreement made with respect to the responsibility or liability, if any, of your company or your towboats engaged in the performance of such towage services?

334 A. We always stipulate that the tug is not responsible in any wise for any loss or damage resulting from the service. If you desire me to state it more definitely I will do so.

Q. I will be glad to have you do it.

A. It is customary to stipulate that the tug will or will not furnish a hawser but in case that the hawser is furnished that the tug and her owners will not be responsible for any loss or damage due to the breaking of the hawser; second, we stipulate that the craft towed

is to be entirely at the owners risk and that the tug to be in no way responsible for any loss or damage arising from the towage services; third, the tug is not responsible in any way for the negligence of the crew of the tug in the performance of the service; fourth, that the towage is to be performed subject to stress of weather and the perils of navigation, the tug in no way to be responsible for the craft towed. If the tow should be broken up the tug will endeavor to locate and pick up the tow and resume the towage service. We also stipulate that the acceptance of the tug for the towage service will constitute acceptance of all of the stipulations as to terms and conditions. We go further, as circumstances may require, about the port and pilotage charges, that the tug will have a lien on the craft towed
335 for their services.

Q. During how long a period of time has such been the terms and conditions of the towage contract made and entered into by your company through you as manager or with your knowledge by your company through its proper officers?

A. It antedates my actual experience in the business as far as our company is concerned. It is a practice that I inherited and have observed rigidly.

Q. And you have been in that business for a period of how many years?

A. Ten years.

Q. So that this custom or practice of making contracts under such terms and conditions has existed for a period over ten years then?

A. Yes, sir.

Q. Is that form of contract usual and general in almost every towage service in the Gulf of Mexico between American Gulf Ports and Mexican Gulf Ports?

A. Yes, sir; that is my understanding. I have come in contact with it practically everywhere. I have had experience with the work in the Gulf as well as along the Atlantic. As a matter of fact I also find—I have found and now find that this is the practice in England.

Q. And that has been the custom and practice with regard to Mexican and American and Atlantic ports during all this time you have been engaged in
336 the business?

A. Yes, sir; as far as I know along the Atlantic. I have had a great many tows that touches that section. Our employments are usually in Gulf waters but where we have made tows along the Atlantic or discussed the subject of tows with the companies along the Atlantic the same practices have been followed.

Q. You spoke of the custom and practice also which prevails with respect to the English tugs or towboats, have you anything that you can refer to that will indicate just what the terms and conditions are that the English tugs require?

A. Yes, sir; I have made an extract here from a handbook that we have in our files. This extract is shown on the attached sheet of paper.

Q. Will you kindly produce the handbook if you have it with you from which this extract was taken?

A. I have it here.

Q. What is the name of the book?

A. (Witness reading): "Wear & Tees Handbook including Seaham Harbour and The Hartlepools. Compiled by Herbert L. Ruddock Published by the Clarendon Publicity Service Ltd., 71 Pilgrim Street, Newcastle-upon-Tyne, England."

Q. Will you be so good as to read from that book the particular provisions that you are referring to?

337 Objection: Mr. Dart:

We object to the question and the evidence sought to be brought out on the ground that it is irrelevant, incompetent and inadmissible and that the declaration of fact that the witness is about to read is a mere self serving statement not admissible and we move to strike out the answer of the witness on that subject and all other answers that the witness may give.

Stipulation:

It is agreed that the same objection and same motion will be considered as having been made to all evidence along this line without the necessity of repeating the objection and also as each question is asked and each answer given.

A. On Page 119 of this handbook under the caption "Towage. Notice—Terms of Towage. During the use of the steam tug for towage services, the master and crew thereof become the servants of and are identified with the ship, and are under the control of the person in charge of the ship during the performance of the contract, the steam tug owners only undertaking to provide the motive power. The steam tug owners are, therefore, not responsible for the acts or defaults of the master or crew of the steam tug, nor for any damage or loss that may arise to the ship or cargo, nor for any damage caused by any defect in or accident happen-
338 ing to the machinery of the steam tug, or to the towing gear or tug's hawser if in use, or by any perils of the seas, rivers or navigation."

That substantially is what we incorporate in our contracts for deep sea towage work.

Q. So that embodies as far as it goes the terms and conditions that are embodied in contracts for Gulf towage between American and Mexican Ports?

A. Yes, sir.

Stipulation:

It is agreed that the extract made by the witness appearing on the letterhead of W. G. Coyle and Company, Inc., is a correct copy of the book and that the book itself may be withdrawn by the witness. This agreement being subject to the objection above noted.

Q. Does W. G. Coyle & Company, Inc., perform a large amount of the Gulf towage services performed by tugs from the port of New Orleans?

A. Yes, sir. I should say we probably do more of that work than any other Gulf operator at the present time and for the past several years. During about 1920—1921 we operated three Shipping Board tugs, one of which was at sea practically all the time, and sometimes two and more tugs were actively engaged in deep sea towing. For the past two or three years we have done a great deal of deep sea barge towing, this
339 barge towing occupying about two-thirds or more time of one of our large tugs.

Q. Do I understand that Coyle & Company, Inc., are designated by the United States Shipping Board as the operators of its tugs in this harbor?

A. Not now, we were for a period of two or three years.

Q. At the present time they operate their own tugs?

A. Yes, sir, we discontinued the operation of Shipping Board tugs about 1922, since which time we have used only our own tugs with occasional chartered tugs of others for deep sea work.

Cross Examination.

By Mr. Dart:

Q. Do you use a regular form of contract which you require your customers to sign?

A. Not as a general thing, we usually make our contracts to cover specific cases and write them out on our letter heads, embodying conditions given hereinbefore by me along with other details necessary to fit the case.

Q. In other words every towage job is the subject of a separate contract you make on your letterheads?

A. Yes, sir.

Q. Which is agreed to by both parties?

A. That is the usual way in which we handle it. During the operation of our Shipping Board
340 tugs we had a specified form of contract which covered more or less conditions but usually for a period of employment. But when we had a specific tow those contracts were handled specifically in each case as I recall it. That was the general practice anyhow.

Q. And it has been the practice of your firm in drawing your contracts to embody a clause substantially along the lines which you have already stated?

A. That is correct.

Q. And it has been your practice as I understand to require that the vessel being towed shall be at the risk of its owners and not at the risk of the towboat company, or at your risk?

A. That is correct. We always feel that the perils of navigation, errors of judgment, and so forth, should be matters for the craft towed to assume, feeling that those risks were properly insurable and that the owner of the tug should not fairly be asked to go further than to risk his tug.

Q. Does that condition include the risk of the negligence of the crew of the tug?

A. Yes, sir, we always emphasize that the tug is not to be responsible in any wise.

Q. No matter what may be the cause of the loss is that correct?

A. That is correct.

Q. For example suppose you were towing a
341 steamship and through the gross negligence of the officers and crew of the tug the ship would meet with a disaster, sinking, under your contract you would not be responsible for that mishap?

A. That is correct. We have insisted that that should be covered by the owner, by the insurance, with proper insurance coverage.

Q. If the loss was caused by the unseaworthy condition of the towboat, would that also be a risk which the owner of the ship or tow would assume?

A. I would say that would not be. That would be a matter for determination but we always offer the tug before hand and if there is any unseaworthiness apparent, if the owner should point it out, if he is aware of it—in other words if anybody was aware of it it would be a matter to be pointed out then, and in a case of that sort we would feel that it should be determined on the facts.

Q. In such a case as that I presume you would expect the owner of the steamship to determine for himself whether the tug was a competent tug to do the service?

A. I don't get that exactly but I mean that if the owner had an objection to register about the tug we would expect him to register that objection before the service started.

342 Q. And in the event that the loss was caused by a storm, that would be a risk that the owner of the vessel would assume under the contract?

A. Yes, sir.

Q. In other words the owner of the vessel being towed assumes all risks other than the unseaworthiness of the tug and as to it they would be required to make up their minds before the service began?

A. I would say yes but the common practice is not—I mean the common practice, I would like to say, in all fairness, is not for any detail inspection but our idea is that if they have any criticism or objections to offer to the tug it should be registered at the time the employment starts.

Q. Do you put anything into your contract in reference to assuming liability for the condition of the tug?

A. No we do not. We generally warrant that the tug is tight, staunch and seaworthy and otherwise competent to engage in the employment for which the contract has been made as far as we are aware of her condition.

Q. When you say that the owner of the vessel being towed assumes all risk I presume you mean all insurable risk, is that correct?

A. I mean he assumes every risk of every kind whatsoever except the things that we warrant about the tug being tight and staunch and properly equipped for the service.

343 Q. Even though he might not be able to obtain insurance against all risk?

A. Positively. We would not let our tug enter into the employment under any other condition. We would rather miss it.

Q. In other words it is up to the owner of the vessel being towed to properly protect himself by insurance?

A. That is correct, and the general practice is for the owner of the tug to designate what tug he will furnish to perform a given service so that the Underwriters may pass on the qualifications of the tug.

Q. If the owner of the vessel would refuse to accept the terms you laid down what would be the attitude of your company. Would you undertake to do the work or not?

A. No we would decline to accept the employment.

Q. Have you ever had the owners of any vessel in New Orleans in this port to refuse to abide by your conditions?

A. Yes, sir.

Q. Do you do any work in the Mississippi Warrior Service?

A. Not regularly now.

Q. Does the Mississippi Warrior Service abide by those conditions and agree that when you tow their vessels it should be at their own risk?

A. They would if we towed them on sea trips.

Q. Otherwise you would not undertake the
344 service?

A. That is correct. I recall having had one or two employments for them.

Q. Have they not protested against the imposition of such terms and conditions?

A. No, sir, not to my knowledge. I would like to say however that we have not had any employment under discussion for the Mississippi Warrior Service in the past two or three years. I mean sea employment.

Objection: Mr. Grace:

We object to any and all matters relating to the Mississippi Warrior Service on the ground that it is purely and simply a coast towage service and not a deep sea or cross Gulf service such as is involved in this case.

Q. You don't know what the attitude of the Mississippi Warrior Service on that subject is today?

Objection: Mr. Grace:
Same objection, and with the consent of Counsel it is agreed that this objection shall stand to all questions of a similar nature without the necessity of repeating the objections to questions so propounded.

A. No, I do not. However I recall that within the past year I was requested to stipulate a proposition to them and I embodied substantially the conditions before stated by me and no objections were expressed
345 thereto.

Q. Did you perform the towage service for them?

A. No my price was considered too high I understood. We did not get the work.

Q. Do you insist upon these conditions in all towage services, I mean not only deep water or Gulf service but harbor or coastwise service?

A. We don't make a specific contract for every towage job but we have towage conditions in our towage draft which we furnish customers that set out the conditions under which we would undertake the employment.

Q. That is for harbor work and coastwise work?

A. For harbor work particularly. Coastwise work we largely adhere to the same conditions that we do for cross seas work.

Q. You mean you have a contract for coastwise work just as you do for cross seas work?

A. Yes, sir.

Q. Have you ever had occasion to tow vessels down to Mexico?

A. Yes, sir.

Q. Have you ever had occasion to tow vessels to Tampico, Mexico?

A. Yes, sir.

Q. Have you at hand any contract with any owner of any vessel so towed by one of your tugs from New Orleans to Mexico?

A. No I have not any at hand. I will state that the principal employments between New Orleans
346 and other Gulf ports, that is United States ports on the one hand and Tampico on the other, apply mostly to Shipping Board tugs, and those employments were largely under charter arrangements, we furnishing the crew subject to the criticism of the owner of the craft being towed.

Q. Have you any contract at hand entered into for service across the Gulf or on the Gulf which embodies these conditions?

A. The conditions I mentioned?

Q. Yes?

A. I have I think one general contract form but I have not it with me.

Q. Have you any contract for a towage on the Gulf which embodies these conditions in one contract that you could let us have? For instance have you in your files a contract which we could offer in evidence here if necessary, omitting the names of the parties and other details which you might want to keep secret?

A. I don't seem to have any in this file that I have with me. I have however a proposition for towing which I submitted under date of March 3, 1925, for the towage of two oil barges from New Orleans to Maracaibo, Venezuela.

Q. May I see it?

A. Yes, sir.

347 (Witness hands Counsel document.)

Q. Was that proposition accepted?

A. No, it was not.

Q. Have you any proposition in your files that was accepted that embodies those terms?

A. The only one I recall off hand Mr. Dart is a recent employment that we had for the Steamship ..... Maru from a port on the southern coast of Cuba to New Orleans. That was in a telegram that showed the conditions in a condensed form. It was accepted and the towage performed. That took place during February, 1925.

Q. When you say this practice prevails not only in New Orleans but on the Gulf Coast, Atlantic coast and in England, you are not speaking from your own knowledge but from hearsay are you not?

A. I am speaking as my previous answer covered, as to my experience in the Gulf and such towages or such towage propositions as we made to and from Atlantic ports. I am speaking from my knowledge as to conditions stipulated by other tug boat owners engaged in towboat work along the Atlantic. As to England, I have no actual personal knowledge but through our efforts to inform ourselves as to conditions obtaining there we have this handbook as we have other
348 handbooks. You understand of course we render services locally to a great many British steamship owners and it is important to us to know what the Britishers do at home and for that reason we try to post ourselves as to conditions obtaining back there.

Q. As to your knowledge as to conditions prevailing in England, that knowledge is derived is it not, from this handbook you have just quoted from?

A. From that and from other sources of like kind that we have gotten hold of and have felt reflected the true situation.

Q. This handbook applies to the practice prevailing in the harbor of Seaham and on the Ware River does it not?

A. Yes, sir, and on the Tees River.

Q. This handbook does not purport to cover the Thames River or the Mersy River or any of the other harbors of England does it?

A. No, that particular one does not but I am quite sure we have had, and may now have, other books similar in nature to the one you hold covering the other ports in the same way.

Q. Your information as to the English practice is therefore derived entirely from these handbooks?

A. That is correct. I think may be we have had some correspondence at times just to check them up.

349 We have a foreign representative who looks after the towage for us and some of our information has been obtained from him. That is Mr. Erick G. Turner of Cardiff, Wales.

Q. Have you ever made any towage contracts of your own for services in England or English waters?

A. None whatsoever.

Q. Have you ever made any towage contracts for services on waters on the Atlantic coast?

A. Not as a regular practice but we have towed between New Orleans and Atlantic ports.

Q. That is to say the service performed by your vessel from New Orleans to and from Atlantic ports?

A. Yes, sir.

Q. You don't operate any vessel out of other harbors to the Atlantic coast except New Orleans?

A. No, not from headquarters anywhere else. We operate our deep sea barges principally between Mobile and Texas ports but the towage service is practically done out of New Orleans. At times we employ outside tugs to handle those barges between the Texas ports and Mobile, Tampa and so forth.

Q. Suppose you undertook to take a sea going barge from New Orleans to Tampico and due to the negligence or mistake of the officers and crew of your vessel the oil barge was lost, would you be responsible for
350 the loss under those circumstances?

A. No, sir.

Q. That would be a risk would it not under your contract that the owner of the oil barge would assume?

A. Or its underwriters, yes, sir. It would not be for account of the tug. As I stated we have always taken the position that it was not fair for the owner of the tug to go further than to risk his tug in such employment.

Q. Does your contract also require the owner of the vessel being towed to assume the risk of all negligent acts which might cause damage to another vessel besides the vessel being towed? For instance suppose one of your tugs, the Sipsey, was towing a steamship and while towing it through the fault or negligence of the crew of the tug the steamship collided with another steamship lying at anchor, would the loss to this other steamship be a risk that the owner of the vessel being towed would assume or would that be up to you?

A. I would say we have employments both ways. I feel that properly we should have a stipulation that a risk of that sort is for account of the owner of the craft towed.

Q. As a matter of fact though you don't embody a special clause covering that condition in your contract do you?

351 A. No, we have not because we have felt that the tug would not be responsible in any wise for loss or damage resulting for towage covering accidents of that sort.

Q. Suppose while performing a towage service that the tug itself was damaged or was lost through the fault or negligence of the crew and officers of the tug, would that be a loss that the owners of the vessel being towed would have to bear under your contract?

A. No, I don't understand so. I understand that would be a matter that is usually covered by the insurance on the tug—

Q. But as between—

A. —or the responsibility that the owner of the tug would take.

Q. But as between yourself and the owner of the vessel being towed there would be no responsibility on the part of the owner of the vessel being towed?

Objection: Mr. Grace:

All this line of examination is objected to as being purely irrelevant, immaterial, incompetent and inadmissible.

Stipulation:

It is agreed between Counsel that this objection shall stand to all testimony which may be of this nature without the necessity of interposing further objections.

352 A. No, sir.

Q. In other words you could not sue the owner of the vessel being towed for the loss of your tug?

A. Not for the negligence of the tug's Master or crew.

Q. In a case of loss of life on board the tug as, for example, where say a member of the tug's crew was drowned, would that be a risk that you, the owner of the tug would assume, or would that be a risk that the owner of the vessel being towed would assume, under the terms of your contract?

A. I think it would depend on the circumstances. If the loss was caused by the negligence of the tug's Master or members of the crew of the tug it would be a matter entirely for the tug and her owners to bear.

Q. In other words you would not expect to hold the owner of the vessel being towed for the loss of that man?

A. Certainly not, or for anything not stipulated in our agreement.

Q. And the language of your agreement does not cover such a case as I mentioned?

A. No, not as I construe it.

Q. Do you know anything about the Tug Wash Gray which is the subject of this suit?

A. No, I don't beyond the fact that there used to be a tug around New Orleans by that name. I don't think I have ever been on a tug by that name. I remember
353 the Pittsburgh Coal Company's interests had a tug by that name at one time in operation around New Orleans or between New Orleans and Baton Rouge. I am not just clear where she was in operation but I know she came into and out of this port.

Q. Have you had occasion to employ any company to tow any vessels of yours?

A. Yes, sir, a few times.

Q. Have you ever had occasion to have one of your tugs towed down to Tampico from New Orleans by a steamship company for instance?

A. No, sir.

Q. I suppose in this case you also had a special contract covering the rights of the parties?

A. Yes, sir. The only one that I recall now we had a contract of that character.

Re-Direct Examination.

By Mr. Grace:

Q. This sheet here headed Towage rates between South Pass and South West Pass to New Orleans, Louisiana, effective September 1, 1923, canceling schedule of July 1, 1921, that has relation to inland water service has it not?

A. Yes, sir; Mississippi River in particular.

Q. And the schedule that was canceled, July 1, 1921, did that have the same condition, as is embodied in the last paragraph of this schedule?

354 A. Yes, sir, substantially so, I think exactly the same. The erasures as a general proposition apply to changes in rates.

Q. Is that last paragraph the one relating to the tug not assuming any risk whatsoever?

A. That is correct.

Offer: Mr. Grace:

The sheet just now referred to is offered in evidence on behalf of Libelants, marked Reeves 1.

(Witness continuing):

That schedule shows the conditions that are generally observed by us for towage in inland waters.

355 TESTIMONY ON BEHALF OF LIBELANT AND EXHIBITS.

Filed May 31, 1926.

United States District Court, Eastern District of Louisiana.

Compania de Navegacion, Interior, S. A.,
vs. No. 17,205.
Fireman's Fund Insurance Co.

And other similar suits by the same party against sundry insurance companies.

Testimony taken, pursuant to notice, in the above referred to causes, on behalf of the Libelant, before Reginald H. Carter, Commissioner, on Tuesday the 25th day of May, 1926, in the office of John D., M. A. & Edwin H. Grace, Hibernia Building, New Orleans, La.

Appearances:

Messrs. John D., M. A. & Edwin H. Grace, (Mr. John D. Grace), for the Libelants.

Messrs. Dart & Dart, (Mr. Henry P. Dart, Jr.), for the Respondents.

Stipulation:

356 Signing, sealing, certification and filing are waived, and it is hereby agreed by and between counsel for the representatve parties that the testimony herein may be taken down in shorthand and transcribed on the typewriter, stenographer's fees to be a taxable disbursement, and copy of this testimony to be furnished opposing counsel.

JESSE C. BARBOUR, recalled for further examination:

Direct Examination.

By Mr. Grace:

Q. Are you the Barbour who is referred to as Captain Jesse Barbour?

A. Yes, sir.

Q. As distinguished from your father, referred to as Captain Barbour?

A. Yes, sir.

Q. You have testified in this case heretofore under a commission down at Tampico?

A. In Tampico, yes, sir.

Q. Since you have testified in the case, there has been some testimony taken from the master of the steamship Freeport Sulphur No. 1, wherein he is under the impression that by means of a translator or fireman on the ship or some one that he used on the night when the Wash Gray met with the disaster,
357 and speaking through a megaphone, that, as he understood it from the fireman, that the Wash Gray was short of water and short of fuel. Do you personally know anything about the water and fuel that was put on board the Wash Gray before she commenced this voyage?

Objection: Mr. Dart:

I object to the question asked, on the ground it is not proper directed examination, leading and suggestive, and that the evidence is incompetent, irrelevant and immaterial.

A. I know she had both water and oil tanks full.

Q. At what time?

A. At the time before she left, before departure.

Q. Before departure; with what vessel or in tow—

A. Of the Freeport Sulphur No. 1.

Q. On the particular voyage where she was lost?

A. Upon that same voyage, yes.

Q. And with her water compartment filled, how long a period of time should that water have served that vessel, going as she was going, in tow of this ship?

A. I would say from a week to a week and a half, sir.

Q. And with respect to the quantity of oil that was laden on board of this vessel at Tampico, for how long a period of time should that quantity of fuel oil serve that vessel on that particular voyage?

358 A. For over a week.

Q. From your previous testimony, I understand you are the manager of the Compania de Navegacion, which was the owner of the steamer Wash Gray?

A. Yes, sir.

Q. You have in your other examination testified with respect to your experience as a water man or sea faring man, and with respect to superintending or managing the operation of the vessels of the libelant company. Do you know about what speed the Wash Gray would make under her own power in the water?

A. About ten miles.

Q. And while she would be running under her own power in the water, would ten miles an hour in any way do her any harm or injury?

A. No, she would make ten miles easily.

Q. The Wash Gray, as appears from your deposition, was used exclusively for inland waters?

A. Yes, sir.

Q. Was she a deep draft or a light draft vessel?

A. She was light draft, sir, twin screw.

Q. The object and purpose of equipping her with twin screw was what?

A. For shallow waters. At that, she drew about eight feet, though.

Q. So that she was a light inland water
359 tug?

A. Towboat, yes, sir.

Q. Did you see how the Wash Gray was made fast to the Freeport Sulphur No 1?

A. Yes, sir.

Q. What have you to say with regard to the condition of things, whether it was done in an proper or improper manner?

A. It was done in the proper way, yes.

Q. Usual and customary?

A. Yes, sir.

Q. Freeport Sulphur No. 1 had no towing machine, had she?

A. She had no towing machine.

Q. Do any of the vessels of the Southern Pacific have towing machines?

A. No, sir.

Q. So that the number of steamers having towing machines are comparatively few, I suppose, in the Gulf?

A. Yes, sir, there is not many.

Q. It appears from your former deposition that you have made quite a number of trips in the Mexican Gulf between west gulf American ports and Mexican ports?

A. Yes, sir.

Q. And you have done that with respect to the towing of quite a number of vessels?

360 A. Yes, sir.

Q. In your observation there, have you seen occasions where the wind would be blowing from the northerly direction at, say, about twenty-five miles an hour, and with a current going in a northerly direction, as it usually runs, from a mile and a half to two miles an hour, have you seen those conditions existing?

A. Yes.

Q. What effect has that wind on that current?

A. It tends to make a choppy sea.

Q. You say it tends to make a choppy sea, or does it make a choppy sea?

A. It does make a choppy sea.

Q. Now where a choppy sea exists under those conditions, with the current running about a mile and a half or two miles, in a northerly direction, and with the wind blowing approximately about twenty-five miles an hour out of, approximately, the north east, was it prudent and good seamanship, in your opinion, for the Freeport Sulphur No. 1 to tow the Wash Gray behind her at a speed of approximately nine miles an hour?

Objection: Mr. Dart:

We object to the question on the ground that the proper foundation has not been laid and we further object on the ground that the question is not
361 properly framed and is not a proper hypothetical question.

A. Yes, sir.

Q. Why, in your opinion, was the speed under those conditions of nine miles an hour a proper speed?

A. I should say that this tow boat required to be towed rather fast; I mean he had to keep the slack out of the line, that this line might whip around and lie on her quarter if there was too much slack left in in the line.

Q. Suppose, for instance, that the speed of the Freeport Sulphur No. 1 was put down to a point where the Wash Gray could run off to one side or the other, under the influence or effect of the sea on her tow line, and she should get in the trough of the choppy sea, what, then, would be the probable effect upon the Wash Gray?

A. The line might trip her.

Q. By tripping her, you mean what?

A. Might turn over.

Q. That would mean the loss of life then of her whole crew?

A. Yes, sir.

Q. So that, for the purpose of avoiding the tripping of this vessel in tow of the Wash Gray, it was necessary to keep a strain on that line pulling her right
362 on, straight through that choppy sea?

A. Yes, sir.

Q. You have made, say, between Galveston ports and Tampico, how many different voyages?

A. You see, I have done that for a period of ten years; it would average from ten to twelve trips a year, some times without a tow, going down with passengers, and some times with tow.

Q. Are you a licensed man?

A. Not American, no, sir.

Q. Beg pardon?

A. Not up here.

Q. And down there?

A. Not down there. I spend all my time down there, but I have actually gone on towboats down there.

Q. In saying you actually ran towboats down there, what did you mean?

A. I was performing the work that every master would have done, but, being a foreigner, I couldn't get papers.

Q. And your experience in handling vessels, actual handling, and requirements of good seamanship, has extended over a period of how long?

A. Fourteen years.

Q. Now where a small vessel, a little tug like the Wash Gray, is pulled on along by towing a ship such as the Freeport Sulphur No. 1, in through a
363 choppy sea, with the waves running, say, about four or five feet from the trough of the sea to the crest of the wave or the top, where that tug, the Wash Gray, will dive into the waves from time to time, could her diving into the waves in any way effect the progress of the steamship itself?

Objection: Mr. Dart:

We object to the question on the ground that the proper foundation has not been laid; the question is not a proper hypothetical question as it does not state the facts, and that the witness is not qualified to answer the question.

A. No, sir.

Q. Then in view of the fact that the steamship, or the progress of the steamship, is not arrested by the diving of this tug into the water, does that put a heavier strain or not on the head of the tug?

A. Unless something else was taking her round.

Q. In other words, is there a heavier strain on the tug, that is, on her head, by reason of the tow line being made fast to the bitts, when she is pulled through the waves, as she would be pulled through by the Freeport Sulphur No. 1, where she has got the waves bearing on her head, would that make a heavier strain on the tow line?

364 A. Just pull her right through the waves, in place of her coming up with the waves, yes, sir.

Q. Now on such ships and on such tugs as may be equipped with a towing machine, where the towing vessel, say the Wash Gray, is diving into the wave, and therefore causing greater resistance on the tow ling, [line] what would that effect be on a towing machine?

A. It would pay out the hawser.

Q. The towing machine would slack away on the line?

A. Slack away on the hawser until the strain had passed.

Q. And that would let the tug come up easily through the waves?

A. Yes.

Q. I understand you to say the Freeport Sulphur No. 1 has no towing machine at all?

A. None.

Q. Supposing the Wash Gray was being towed by a small light steamer or tug, would her diving into the water alone have the effect of tending to check up the progress of the tug that would be towing her?

A. I think it would.

Q. When the Freeport Sulphur left Tampico, she left with the usual load that she leaves that port with?

A. Yes, sir.

365 Q. Is she a vessel well known down there at Tampico?

A. Very well known, yes, sir.

Q. Made many voyages to Tampico?

A. Yes, sir.

Cross Examination.

By Mr. Dart:

Q. Mr. Barbour, what position do you hold in the libelant company?

A. In what, sir?

Q. What position do you hold in the Compania de Navegacion Interior, S. A.?

A. General manager.

Q. You are located down in Tampico, are you?

A. Yes, sir.

Q. How long have you been general manager of the company?

A. About ten years, I guess.

Q. How old are you?

A. Thirty.

Q. You say that you are not a licensed man; what do you mean by that?

A. You mean, if I had an American license as captain?

Q. You hold no master's license?

A. No, sir.

Q. Do you hold any license at all to navigate vessels?

A. No, sir. If I may say so, when I went
366 to Mexico, I was sixteen. In that country, their requirements are you have to have a Mexican engineer and a Mexican captain, on a Mexican vessel. That is the only vessels I ever had charge of, and I was doing the work, I served my time.

By Mr. Grace:

Q. Doing what kind of work?

A. Served time as engineer and served time as master on these boats.

By Mr. Dart:

Q. In other words, although you hold no license, you work on board a tug boat?

A. Yes. I do that for my own satisfaction, not because it was the law.

Q. Have you ever navigated a tug across the Gulf?

A. No, sir, but I have been on board of them when they have been towing across.

Q. What was the reason for bringing this boat, the Wash Gray, from Tampico to the United States?

A. To put new engines in her, rebuild her.

Q. Put new engines on her and rebuild her?

A. She had a high pressure engine and we were going to put low pressure engines in her.

Q. Where were you going to have her rebulit?

A. At Galveston.

367 By Mr. Grace:

Q. You mean the tug or the engine?

A. The engine.

By Mr. Dart:

Q. Why didn't you have her rebuilt down in Tampico?

A. If you ever had anything rebuilt down in Tampico, you would know it was prohibitive.

Q. What sort of engines did you have in the Wash Grave when she left Tampico?

A. High pressure engines.

Q. What make?

A. I couldn't tell you. I think they were built by Hedge & Wall, of New York.

Q. What sort of engines were you going to put in at Galveston?

A. Going to put in compound engines.

Q. Are those high pressure engines?

A. No, sir; high pressure and low pressure. There is two cylinders and the exhaust steam from the high pressure goes into the low pressure cylinder.

Q. Why did you change your engines?

A. Because she was taking too much steam; in order to give her more power.

Q. What other work were you going to have done on her?

A. She was going to have an overhaul while
368 she was there.

Q. And after she was generally overhauled, she was going to be brought back to Tampico?

A. Back to Tampico, yes.

Q. In your previous deposition, in answer to the third interrogatory, you testified as follows:

"We followed the recommendations of surveyors as follows: both forward bitts were caulked and made watertight; all seams in forward main deck were caulked and made watertight; all seams on after main deck were caulked and made watertight; all coaling ports were planked over and made watertight; all windows and doors in lower wheel house and all of the cabin were planked and made watertight."

What was the matter with the forward bitts that made it necessary to have them caulked and made watertight?

A. The sun had dried out the seams a little bit around the deck, round the bitt where it went around the deck, the planking of the deck, and he had us put a string of oakum around there and a little asphalt on top of it. That is all it was.

Q. Was it due to the strain placed on the bitts forward as a result of towing?

A. No; the weather, lying in the weather and the sun on the deck beating down on it.

Q. You overcame that by caulking these open seams on the deck?

A. Caulking the seams on the deck.

369 Q. Around the towing bitt?

A. Around the towing bitt, and also the fore and aft seams on the deck they had us caulk.

Q. They were all open, were they?

A. They were open, not much but he wanted to put in more oakum.

Q. They were open so that water would enter into the lower part of the vessel if they were not caulked, that it why he caulked them?

A. Yes, that is why we caulked them. I don't mean to say there were holes you could put your finger through, or anything like that.

Q. How much did the Wash Gray draw forward at the time she left Tampico?

A. She drew about six and a half feet.

Q. How much aft?

A. About eight feet, eight and a half.

Q. How many gallons of water did you put on board of her?

A. A hundred tons.

Q. And how many barrels of oil did you put on board of her?

A. 125.

Q. Was that her capacity?

A. That was her capacity, yes.

Q. That amount of water should have lasted her, you say, about a week or ten days?

A. At the very least.

370 Q. Why was it she had no water, or not sufficient water, to keep up steam in the boilers at the time she went down?

A. That is something I don't know. I wasn't on board of her, you see. Her tanks may have leaked or something happened. I don't know.

Q. Please describe the towing arrangements, that is to say, the hawser and the method in which it was fastened to both the tug and the steamer.

A. If I remember right, it was an eight inch hawser, came through the Wash Gray's side, and made fast on to her bitt.

By Mr. Grace.:

Q. You say "through her side"; you mean the side chock, don't you?

A. The side chock was made fast to the bitt, and the bight of the line was turned back aboard the ship. When the vessel took hold of her out in midstream, it had her on a short tow line, towed her out of the harbor on a short tow line.

By Mr. Dart:

Q. Did you notice how the hawser was fastened to the steamship?

371 A. No, sir; that is what I am going to say —I hadn't finished. She was taken out on a short tow line and out to sea they let it out. I don't know how they made it fast. I rather think it was run up through the side chock of the ship and made fast to her bitts.

Q. How many parts of the line extended between the tug and the steamship?

A. Two.

Q. In other words, the hawser was doubled?

A. The hawser was doubled, yes, sir, like that, (witness illustrating).

Q. So when the tug was being towed, it was towed on two lines?

A. Two lines.

Q. What length of hawser was it contemplated that the vessel should use for towing?

A. Between five and six hundred feet, sir.

Q. You think a hawser of five or six hundred feet a proper length of hawser for the purpose of towing a vessel out in the Gulf?

A. That was ample for her, yes, sir.

Q. Ample for the Wash Gray?

A. For the Wash Gray, for a tug of that size.

Q. Would that be sufficient, in your opinion, to relieve the strain upon the tug as it was being towed?

A. In all ordinary weather, I should say so.

372

Q. Would that be sufficient in heavy weather, stormy weather?

A. I don't know.

Q. Sir?

A. Why I think it is always considered it would be, yes, sir.

Q. I understood you in your direct examination to say that by diving through the waves, as the tug was being towed, a greater strain would be placed on the hawser and on the tug than if she rode over the waves?

A. Yes, sir.

Q. That is a matter of common sense and common knowledge, is it?

A. Yes, sir.

Q. And I also understood you to say that if she had been able to ride over the waves, the strain upon the hawser and the tug would have been much less?

Objection: Mr. Grace:

I object. We call counsel's attention to the fact that the witness has testified that it was necessary to keep at the speed to keep a strain on the line at all times, not affording any slack in the line to ride upon the waves, which would have sent her off into the trough of the sea.

Q. Now along the line of counsel's statement, I also understood you to say in your direct examination, that it was necessary for the towing vessel to maintain a speed of say nine miles an hour in order to keep the line taut and prevent the tug tripping over the slack line; is that correct?

373

Mr. Grace:

Not tripping over the slack lines; from running off and tripping.

Q. Running off and tripping; is that correct?

A. That is right, sir, and when I said she would have to have a line long enough to keep the strain off the tug boat, it was to be understood from that that these tug boats will surge on a line when there is a swell, which puts more strain on than a steady pull, just like jerking on a line, it is not pulling the whole thing all the time.

Q. In other words, to prevent the tug running off on the side and getting into the trough of the sea, it was necessary to keep the line taut?

A. As taut as possible, yes.

Q. So the towing vessel had to maintain sufficient speed to keep it taut?

A. Yes, sir.

Q. Even though that had the effect of pulling the nose of the tug through the waves instead of over the waves; is that correct?

374 A. I should say yes.

Q. What was it you said about there being no towing machine on the Freeport Sulphur No. 1?

A. I don't think there was a towing machine on her, sir.

Q. You don't think so?

A. No.

Q. Have you ever accompanied a tugboat that was being towed across the Gulf by a steamship?

A. Yes, sir.

Q. What tug have you accompanied under those conditions?

A. I won't say a tug boat of her kind, but other tugboats on top of barges, I have been with, stern wheel boats on top of barges, five trips.

Q. You made five trips?

A. On the stern wheel boats themselves, being towed by steamers, but not a twin screw boat like the Wash Gray.

Q. Did you make the trip down from Galveston to Tampico on the Wash Gray when she was towed down?

A. No, sir.

Q. And of course you didn't make the trip back to Tampico—to the United States—on the Wash Gray?

A. I started to.

Q. You were sick at the time, were you not?

A. Yes, sir; I was sick.

Q. Did you change the crew on the Wash Gray at the last minute, or order it changed just before

375 sailing?

A. Some men went on her that was on her the day before.

Q. How long had that crew been on the Wash Gray?
A. They were hired for that purpose.

By Mr. Grace:
Q. For that voyage, you mean?
A. For that voyage.

By Mr. Dart:
Q. They had never been on the Wash Gray before that voyage?
A. No, sir; they hadn't been on the Wash Gray. One engineer had been on her while she was running, while she was operating, but she had not been operating in a couple of months.
Q. Been laid up a couple of months?
A. Yes, sir.
Q. Why had she been laid up?
A. Because we didn't have work for her.
Q. This crew that you had on board were all Mexicans, I presume?
A. Mexicans, yes, sir.
Q. You had no Americans on board of that vessel on that voyage?
A. No, sir; no Americans; we can't do it because of the law.
Q. Well, you had no one on board of the tug, accompanying the vessel?
A. No, sir.
376 Q. Except the Mexicans?
A. Except the Mexicans.
Q. I understood you to say that you made five or six trips on stern wheel boats which were being towed across the Gulf on top of barges, which barges were being towed by steamers; is that correct?
A. Yes, sir.

Q. Did you meet with any disaster or accident on any of those trips?

A. No, sir; none at all.

Q. The stern wheel boats were placed on top of the barges; is that correct?

A. Yes, sir.

Q. What were they; tug boats?

A. They were tug boats but river tugboats like we have up here in the Mississippi River, towboats.

Mr. Grace:

You mean towboats. You said "tug boats." Tugs have engines with a propeller.

Q. Why were they not out in the water instead of on top of the barges?

A. Because it was found safest to carry them on top of barges, less risk.

Q. Were the doors and windows of the Wash Gray left open at the time she left Tampico?

377 A. No, sir; they were shut.

Q. Hadn't the vessel just been fumigated?

A. One half of one door was open.

Q. But that door was open?

A. That door, half of it was open, yes, sir.

Q. Well, weren't several of the windows open when she went down the river?

9. No, sir, to my knowledge, no, sir, when I saw her leave at our dock, there was only one window that was open. That was because she had just been fumigated, lying up an hour and a half without any fire in her, and they had to get up steam just before she left, and the man had to go down to start the fire.

Q. How much freeboard did this tug have?

A. About three and a half feet, sir.

Q. How long had the Wash Gray been down in Tampico from the time she arrived there from the United States until the time she left in tow of the Freeport Sulphur No. 1?

A. I think about a year and a half, sir.

Q. During that time, had she been repaired?

A. No, sir.

Q. Had she been hauled up during that time—

A. No, sir.

Q. —in dry dock or on the ways?

378 A. No, sir, but she had come to Tampico practically a new boat, she had been rebuilt before she came there.

Re-Direct Examination.

By Mr. Grace:

Q. Speaking of the opening in the upper part of the door of the fire room, was there any other way that the fireman could get down to the fire room of that boat to get up steam and keep up steam on the vessel?

A. That was the only way, sir.

Q. And that upper part, was it so fitted that it could be closed at will?

A. Yes, sir.

Q. From the inside as well as the outside?

A. Yes; it was on hinges, to be locked from the inside.

Q. With respect to the seams that were open around near the bitt, did that in any way affect the strength of the bitts themselves?

A. No, sir; not at all; they were made fast to the deck, they were made fast in a hole.

Q. Did Mr. Bern Dyer and Mr. James F. Taylor, the two marine surveyors, inspect those particular bitts?

A. Yes, sir.

Q. Both of them?

379 A. Both of them.

Q. And made whatever recommendation they saw fit?

A. Yes, sir; we did what they wanted us to do.

Q. After the tug had taken water into her hold, could she have taken sufficient water in her hold to set the planking down in her hold adrift?

A. Yes, sir.

Q. And with that planking or other objects that might float in the hold set adrift, was it possible for that or any of that drifting material to have broken the water or broken the oil connections?

A. Very probably, yes.

Q. So that the fuel oil and the boiler water was subject then, through broken connections, to have wasted out or leaked out or run out by being broken by this floating material?

A. If they were broken, yes, sir.

Q. Now a Mexican crew was required by the laws of Mexico, she being under Mexican registry?

A. Yes, sir.

Q. She had been an upper Mississippi or Ohio River towboat, wasn't she an upper Ohio River towboat?

A. Yes, sir.

380 ARTHUR A. GRANT, sworn and examined as a witness on behalf of the Libelant, testified as follows:

Direct Examination.

By Mr. Grace:

Q. What is your name?

A. Arthur A. Grant.

Q. What is your present occupation?

A. Marine surveyor.

Q. When did you first become identified with maritime affairs in any capacity at all, from the very earliest?

A. I guess I started out that way.

Q. At what age?

A. Oh, I don't know. I went to work in a ship repair yard when I was fifteen or sixteen.

Q. In what yard?

A. Morse dry dock.

Q. And you continued in service at that yard for how long a period of time?

A. About fourteen or fifteen years.

Q. And during that period of time, entering as a boy, you worked up to what position?

A. As superintendent.

Q. Well then, from a boy, entering upon this service, you worked up all the way through different positions to superintendent?

A. Yes, sir.

381 Q. What sort of a yard is that as compared with ship yards generally?

A. It is probably the best yard of its kind in New York harbor.

Q. And with regard to its capacity for handling vessels?

A. At present it operates the largest floating dry dock in America.

Q. After that service for that period of time, what service did you next enter upon?

A. Marine superintendent of the Freeport & Tampico Fuel Oil Company, or corporation.

Q. And they operated what?

A. They operated a fleet of steamers and ocean going tow boats and barges.

Q. About how many of them, all told?

A. We had four sea going tug boats and barges connected with them.

Q. And they were, those barges that you speak of are what kind?

A. They were oil tankers.

Q. Practically hulls of ships, you mean?

A. Yes; they were converted tankers, had been converted from dry cargo boats.

Q. And their business was principally what?

A. Transporting oil from Tampico to New
382 Orleans and Gulf ports.

Q. And how long a period of time did you stay with them as their marine superintendent?

A. Well, they were taken over by the Sinclair Company, and I continued on upon the two jobs about eight years.

Q. Your services as marine superintendent consisted of what?

A. I had charge of the physical operation of the fleet.

Q. So that where they went, or how they went, and how they were required to handle themselves with regard to physical features of the voyage and so on, were matters under your direction?

A. Yes, sir.

Q. You looked after the upkeep and things of that kind too?

A. Yes, sir.

Q. And then you were with the Sinclair Company for how long a period of time?

A. That Sinclair service is included in that eight years.

Q. And that brings you down to about when?

A. When I went to the Jahncke Dry Dock.

Q. And that was in what year?

A. That is about three years ago, or a little over.

Q. Somewhere about /24?

A. About 1923 or /22.

Q. And then, what connection did you have with the Jahncke Dry Dock?

383 A. I was general manager of the Jahncke Dry Dock.

Q. And in addition to these services, Mr. Grant, did you represent the United States Government in any capacity with respect to water craft.

A. Yes; during the war I represented the Board of Surveyors and Consulting Engineers of the United States Shipping Board in the Gulf.

Q. What were your duties in that service?

A. In that job, I took over the German and Austrian interned ships in the Gulf and in Cuba, and repaired them, fitted them out and sent them to sea, and after that I served as consulting engineer for the Division of Operations of the Shipping Board until the Armistice.

Q. During that period of service here, in Gulf ports and in the Government service, which you have mentioned, and in your connection with the Jahncke Dry Dock, did you have much experience in towing craft for others and having craft of your own towed by others?

A. Yes, sir.

Q. In the handling of tows for others, and in having your own vessels handled, what was the condition of things with respect to the responsibility on those jobs in the Gulf?

A. You mean from the owners' point of view, the towboat owner's point of view?

384 Q. Yes.

A. Whenever I made a contract, I tried to tell them that I was supplying the tow boat to tow their boat to the best of our ability; that we were not responsible for the boat nor the crew.

Q. That the tow, then, was being towed at the risk of whom?

A. At the risk of the owner of the boat.

Q. The owner of the tow?

A. Of the boat that was being towed.

Q. Was that the condition of things with respect to the towage services that you performed in all of this service that you speak of in the Gulf?

A. Yes, sir.

Objection: Mr. Dart:

We object to that question and all questions along the same line on the ground that the evidence is incompetent, irrelevant and inadmissible.

Q. And did that same condition prevail where you had vessels of your own towed by others, that your vessels were being towed at your own risk?

A. Yes, sir.

Objection: Mr. Dart:

Same objection.

385 Q. In those cases, was a tug to be held for or on account of any damage that might happen to the tow?

A. No, sir.

Q. Was that the custom and practice during all the period of time you have spoken of with respect to your service in the Gulf of Mexico?

A. In my experience, I have never known a case where the towboat was responsible for the ship it was towing in the Gulf from one port to another.

Q. Mr. Grant, we have here, in this case, a consideration of matters relating to the wooden twin screw tug Wash Gray, and I show you Libelant's Exhibit-3, which was identified by Mr. J. C. Grant, a witness in this case, as being a record of survey made by him of this tug Wash Gray. Do you know Mr. Grant personally?

A. Yes, sir.

Q. Do you know his reputation as a marine surveyor and appraiser of vessels?

A. Yes, sir.

Q. How does he stand?

A. Very good.

Q. I show you that, and then I will ask you some questions in regard to the tug. The idea of showing you this is for the purpose of giving you an idea of the kind and character of the vessel we are talking about.

386

(Document in question handed to witness. Witness peruses same.)

A. All right, sir.

Q. Taking this exhibit with respect to the steamer Wash Gray, what would you say, in your opinion, would be her running capacity or power in inland waters, for which she was constructed?

A. The speed?

Q. Yes.

A. Nine or ten miles.

Q. Taking this vessel as she is, a vessel of this character, do you consider that towing her through Gulf waters with a sea on, choppy at times, at least, with the

waves running about from four to five feet, with a variable wind, going up some times to approximately twenty five miles an hour from a northeasterly direction, and with a current running northerly at approximately from a mile and a half to two miles an hour, would you consider it good and proper seamanship under those circumstances to tow that vessel through that sea at nine miles an hour?

Objection: Mr. Dart:

We object to the question and all similar questions along the same line, on the ground that the proper foundation has not been laid, that the witness
387 is not qualified to answer the question; that the question is not a proper hypothetical question in that it does not state all the facts or the facts in the case, and that the evidence is irrelevant, incompetent and inadmissible, and we move to strike out any testimony that may be given in answer to the question and other questions along the same line. It is agreed that the same objection shall be considered as having been urged to all questions along the same line without the necessity of repetition.

A. The speed that this boat could be towed at would be very much at the discretion of the captain of the boat that is towing her, and as far as going nine knots she is able to go nine knots, but whether with the conditions of the sea running at the time, it was the best speed, I think the captain or the fellow in the tug boat, in the steamboat, would be the best judges.

Q. Do you hold any marine licenses?

A. Yes, sir.

Q. What grade?

A. Chief engineer.

Q. Assuming that there was a sea condition with wind at times running approximately twenty five miles an hour, as put by the other side, and choppy
388 at times, and raising waves as say four or five feet from the trough of the sea to the top of the wave, if the towing vessel, say the Freeport Sulphur No. 1, loaded with a fairly good cargo, should run at a speed sufficiently slow to permit the Wash Gray to run off from one side or the other into the trough of the sea, whether it would be a heavy running sea or a choppy sea, what effect would probably result to the tug when the tow line would pull heavy on her while she would be in the trough of such a sea?

A. Probably turn her over.

Q. With the loss of the tug and the lives of those on board?

A. Yes, sir.

Q. So that, therefore, much must be left to the discretion of the master or navigating officer of the ship doing the towing as to the particular speed requisite for the purpose of saving the tug from being turned over?

A. Yes, sir.

Q. Where such a vessel as the Wash Gray is towed along through the sea at a speed sufficient to keep her from running off into the trough of the sea and causes her, as she may roll or pitch, to pitch into a wave, would the pitching of that tug into the wave check
389 the progress of a vessel like the Freeport Sulphur No. 1?

A. No, sir.

Q. Then, in pulling the tug through that wave, would there be an extra heavy risk upon the bitts and the head of that tug while the head is in the wave?

A. Liable to pull the bitts out of her.

Q. Now where the towing vessel would be, say, a light vessel or a seagoing tug, would the diving of the Wash Gray into the wave have the effect of checking up in some degree the towing vessel?

A. Oh yes, with a light tug.

Q. That would permit her to come up easier?

A. Yes. On the barges Prytania and Badger that we operated for the Freeport Company, we had towing machines and we made the tow fast to the tugs, and these were wooden tugs, not so very heavy, and the surge on that line was such that the tug could take care of the surge, we never needed to use the towing machine on that account, because the tug was light.

Q. With a towing machine on board of the vessel doing the towage service, if by reason of the tow diving into a wave and there being some extra strain put on the tow line, what effect has that on the towing machine?

A. The towing machine eases off the strain and takes in the slack, when there is slack.

390 Q. In other words, as the head of the towing vessel would strike into a wave, the towing machine would slack the line of the tow?

A. Yes, sir.

Q. So as to ease off that strain?

A. To ease off the strain.

Q. Then, after she came through the waves, it would wind in the slack?

A. Yes, sir.

Q. And that operates automatically?

A. Yes, sir.

Q. There was no towing machine on the Freeport Sulphur No. 1?

A. No, sir.

Q. Where a vessel such as the Wash Gray is towed along through the waves, either a smooth running sea or

a choppy sea, what effect has the pitching and rolling of such a tug, in a sea where the waves may be say from four to five feet high, what effect has that on her seams?

A. She is liable to open up.

Q. Is that true of all wooden vessels?

A. The wooden tug boats that we operated, always, after a norther, we had to caulk the top side deck and along the side of the house. That was quite a standing thing with us.

391 Q. Where the wind is from a northerly direction, say from approximately the north east, and the current is running up say a mile and a half or two miles, what kind of a sea, if any, would that ordinarily create?

A. A confused sea, choppy.

Q. What effect has that character of sea upon such craft as this wooden vessel, the Wash Gray?

A. Has a tendency to make them pitch and roll.

Cross Examination.

By Mr. Dart:

Q. Mr. Grant, do you hold a master's license?

A. No, sir.

Q. Do you hold a mate's license?

A. No, sir.

Q. Or a second officer's license?

A. No, sir.

Q. Or a third officer's license?

A. No, sir.

Q. Or a deck officer's license?

A. No, sir.

Q. Have you ever navigated a steamer?

A. No, sir.

Q. Have you ever navigated a tug boat?

A. No, sir.

Q. Have you ever accompanied a steamship while towing a tug boat or other craft across the Gulf?

A. No, sir.

Q. Have you ever been in the tug boat business?

A. I have operated tug boats for the Freeport Company.

Q. Well, what part of the business of the Freeport Sulphur Company?

392 A. Freeport Oil Company and the Sinclair Company.

Q. But you have never actually physically operated them yourself?

A. Never went to sea in a tugboat as a member of the crew.

Q. Now you have never engaged in the tug boat business of towing vessels for hire as a general business, have you?

A. Yes, sir. We used to take outside towing, we were in that business. For instance, we towed barges to and from Tampico, and we towed dredges for the Government.

Q. That was merely an incident to your oil business, wasn't it?

A. An incident to the oil business, yes.

Q. The Freeport Oil Company and the Sinclair Oil Company are in the business of manufacturing, transporting and selling oil, are not they?

A. Yes, sir.

Q. And when you were connected with those companies, you were really in the oil business and not in the tug boat business?

A. The towing business was an adjunct of the oil business.

Q. You have no knowledge of the tug boat business generally, outside of your own experience with the Freeport Oil Company and the Sinclair Oil
393 Company, have you?

A. Only that I have ordered, employed and been connected with tug boats and the handling of ships in every job I was in, as we did all our shifting with tug boats from one port to another and in and out of ports, towboating most of the time.

Q. What did you say was your rule with reference to handling vessels in tow when you were connected with the Sinclair Oil Company?

A. Whenever I made a contract for an outside tow, I stipulated we were going to tow the boat as far as she went and that is as far as our responsibility went.

Q. And did you always insert a clause in your contract that you wouldn't be responsible for any damage to the vessel being towed?

A. Yes, sir.

Q. That is, for outside towage?

A. Yes, sir.

Q. You don't mean to say that is the universal custom prevailing all over the world, do you?

A. When I was at Jahncke's, every time we had a contract for towing, Galveston, Mobile, Port Arthur or similar contracts, in no instance did the towboatman assume responsibility for damage to the ship or anything connected with it. For instance, Alexander
394 would tow a boat for us from Mobile for $900.00, and you can quite readily see from that he would assume very little responsibility for the ship, because the premium on the insurance would take up pretty near that much money.

Q. You refer to towing done by Lester F. Alexander & Co.?

A. Yes, sir.

Q. They did practically all of the towing for Jahncke, did they not?

A. No; it was split up. Bisso got some of it and Alexander got some of it.

Q. You don't pretend to say that that rule that you say existed when you were connected with the Sinclair Oil Company, existed all over the United States, do you, in every harbor of the United States; you have no knowledge of that?

A. The only knowledge I have is what I did.

Q. Exactly; your knowledge is based on your personal experience?

A. Yes, sir.

Q. You don't know what the rule is, for instance, at Mobile, Pensacola, Tampa, Jacksonville, Charleston, Newport News or New York harbor, do you?

A. About Mobile, I do know, because we get prices on these outside tows all the time and they are in keeping with the ones we get here, and they dis-
395 tinctly tell you they are not responsible for the ship.

Q. There is nothing to prevent a towboatman from making a contract whereby he does not include such a clause in his contract?

A. Not a thing in the world.

Objection: Mr. Grace:

I object to that as wholly irrelevant. There is nothing to prevent a towboatman from giving his towboat away to anybody he sees fit to make a present of it to.

Q. In other words, it is a matter of contract between the parties, they can make any bargain they see fit to make?

A. Yes, sir.

Objection: Mr. Grace:

We submit that is not a point at issue. We submit that what they see fit to do is what we are establishing, not what they might see fit to do.

Q. Now you stated, I believe, in your direct examination that the rate of speed at which a vessel with a tow a steamship in tow of another vessel, would depend, would it not, on the judgment and discretion of the master of the steamer?

396 A. Yes, sir.

Q. In other words, he would regulate his speed according to the conditions?

A. Yes, sir.

Q. In other words, he wouldn't tow the vessel as fast in a choppy sea as he would in an absolutely calm sea?

A. Yes, sir; use his experience and do what he thought best.

Q. The strain upon a craft being towed would be greater in a choppy sea than it would be in a calm sea, would it not?

A. Yes, sir.

Q. Do you know the Freeport Sulphur No. 1?

A. Yes, sir.

Q. Do you know what her speed is?

A. I think she is about nine or ten knots, well, nine knots loaded.

Q. Her maximum speed is about nine or ten knots?

A. Something like that.

Q. Do you think it would be wise to tow a tugboat across the Gulf of Mexico at nine or ten knots an hour in behind the Freeport Sulphur No. 1 in all conditions of weather?

A. It is pretty hard to say.

Q. That also would depend on the conditions of the weather and the current?

A. Weather, current, tow line, bitts—

397 Q. And the condition of the vessel being towed?

A. Yes, sir.

Q. In other words, the amount of freeboard that the vessel being towed has above the water has also something to do with it?

A. General conditions of the tow, of course.

Q. Why do vessels have these towing machines?

A. To take care of the surge and the pitching and so on.

Q. Where a vessel has no towing machine, it is all the more necessary that the master of that vessel should exercise greater care in towing, is it not?

A. Yes, sir.

Q. Did you ever see the tug Wash Gray?

A. No, sir.

Q. You know nothing about it?

A. (No answer.)

Q. Are you in position to say whether or not it would be safe to tow a tug of the description of the Wash Gray at a speed of nine miles an hour across the Gulf of Mexico from Tampico to Galveston?

A. No, sir.

Q. You are not in position to say?

A. No, sir; so much depends on that condition of the tug and the condition of the weather and everything, no man can sit here and say that.

398 By Mr. Grace:

Q. The condition of the sea?

A. The condition of the sea and everything. No man can sit here and say that.

By Mr. Dart:

Q. Is it customary for the steamship while in the act of towing a vessel across the Gulf to regulate its speed according to conditions?

A. Yes, sir.

Q. In the course of your business experience, in the course of your experience, was there ever a case where a perfectly seaworthy craft that was being towed behind a steamer, was either lost or damaged as a result of improper towage?

Mr. Grace:

You mean of his own personal knowledge. He would have to be there and see the towage.

A. I never got any captain to admit that.

Q. Still, you do know of cases where seaworthy craft have been towed, and at the end of the voyage turned out to be badly damaged as a result of their experience, do you now?

A. Mr. Orr's barge.

399 Q. What was Mr. Orr's barge?

A. A barge built at the Jahncke Dry Dock.

Q. What happened to that?

A. They towed it from here to Jamaica and from Jamaica to Bluefields.

Q. What was its condition when it arrived at Bluefields?

A. Very bad.

Q. Was that barge a seaworthy barge when it left New Orleans?

A. Yes, sir.

Q. Was she towed behind a steamer?

A. Yes, sir.

Q. And when she arrived there, she was badly damaged?

A. Yes, sir.

Q. Was that due to improper towage?

A. The captain doesn't admit it and I didn't see it.

Q. What happened to the barge exactly, what was the nature of the damage?

Objection: Mr. Grace:

I object, on the ground that the circumstances under which the happenings, whatever they may have been, to the barge was not within the personal knowledge of the witness.

Q. What was the condition of the barge at the end of the voyage?

A. She was leaking and generally bunged up.

Q. Do you know of any other experiences
400 of the same sort or character?

Objection: Mr. Grace:

Objected to on the ground that the same character or same sort is very vague and indefinite. The witness was not present and the captain doing the towing does not admit that he was at fault in respect to the towage service.

Mr. Dart:

I am cross-examining the witness on the extent of his knowledge and qualifications, and am asking these questions to see what actual experiences, if any, were brought to his attention while he was connected with the Sinclair Oil Company and the Freeport Oil Company or the Jahncke Dry Dock.

Mr. Grace:

Then I submit that any question propounded must relate to something within the personal knowledge of the witness.

Q. I speak of matters within your personal knowledge while you were connected with any of these companies?

A. I don't know.

Q. And the case of the barge that you just mentioned is the only instance you have in mind?

A. The only one I can think of right off.

Q. What was it you said about the possibility of towing bitts being pulled out on your direct
401 examination?

A. (No answer.)

Q. In answer to some question of counsel for the libelant, you stated that under certain circumstances it was possible for the towing bitts on the towboat to be pulled out.

A. If it was very rough and the vessel pitched excessively and the towline jerked on account of both boats pitching, it would very likely start the bitts and pull them out.

Q. That, of course, could be overcome by regulating the speed of the towing vessel?

Objection: Mr. Grace:

I object.

A. I don't know that it could.

Q. That also depends upon circumstances?

A. Absolutely.

Re-Direct Examination.

By Mr. Grace:

Q. As against taking the chance of letting the tug go into the trough of the sea, and tripping, capsizing and turning the craft over, would it be better seamanship to take the chance of pulling the bitts out of the tug?

A. The lesser of the two evils.

402 Q. With respect to this Orr's barge that was mentioned, you have no personal knowledge of the condition of the weather that was encountered by her?

A. No, sir.

Q. Nor the condition of the sea?

A. No, sir.

Q. Nor whether she was towed too fast or not fast enough?

A. No, sir.

Q. Now I understood you to say that the towing business was quite an adjunct with respect to that Freeport Company and the Sinclair Company, and that you did quite a lot of it for the companies and had a good bit of it done for yourselves?

A. Yes, sir.

Q. Now I understand in all of those cases where you made the contract, the service was rendered entirely at the risk of the tow?

A. Yes, sir.

Q. And that in those cases, where you secured towage services to be performed for those companies or the Jahncke concern, that the various tugs which contracted with you, with those companies through you, insisted also that the towage service should be performed at the risk of the tow?

A. Yes, sir.

Q. In your business as a marine surveyor,
403 are you called upon frequently for the purpose of determining or passing upon the seaworthiness of a vessel, the towage arrangements and the fitness of the vessel?

A. I have been.

Q. What was understood by the term that the towage arrangements should be passed upon by the surveyor?

A. The physical towing equipment, like the bridle and the line and the bitts and such other stuff.

Q. Anything to do with the contract between the tugs or towing ships and the owners of the towed vessels?

A. As surveyor, I never see any contracts.

Q. You have been doing that kind of work for a period of—

A. In connection with my other work, for ten years on and off.

Q. I show you two certificates issued with respect to the Wash Grace, one of them signed by surveyor of the Underwriters' Agent, Bern Dyer, acting under William J. Pulford, Board of Underwriters' Representative at Tampico, New York Board of Underwriters representative at Tampico, and the other signed by James F. Taylor, and I ask you, in your capacity as marine surveyor of vessels for towage, to look at those two certificates, and state on the face of these certificates
and the further fact that it was stipulated with
404 the Freeport Sulphur No. 1—and the further fact that the policy or insurance, or policies of insurance, cited herein stipulate that the towage service should be performed by the steamship Freeport Sulphur No. 1, whether there is anything else that the owner of a vessel could possibly do beyond what those two certificates show he has done to make his

vessel fit and proper and comply with all the requirements of the underwriters for the towage service from Tampico to destination on those certificates?

A. This is the usual thing.

Q. Is there anything else that the owner could have done, is there anything else required of the owners?

A. No, sir.

(Witness examining certificates referred to.)

CAPTAIN C. A. BARBOUR, recalled:

Direct Examination.

By Mr. Grace:

Q. Captain, you are the Clyde A. Barbour who testified heretofore in this cause at Galveston, Texas?

A. Yes, sir.

Q. You are the president of the Compania de Navegacion Interior, S. A.?

A. Yes, sir.

405 Q. Owners of the steamship Wash Gray at the time she was lost?

A. Yes, sir.

Q. At the time when the Freeport Sulphur billed you in the amount of the towing bill as stipulated in the contract signed by yourself and by Mr. Mims with respect to the towage of the tug Wash Gray by the steamship Freeport Sulphur No. 1, did you pay that bill?

A. Yes, sir.

Q. Any delay about paying it?

A. No, sir.

Q. If you had in any way believed that the steamship Freeport Sulphur No. 1, her officers or crew, had been at fault in towing the tug Wash Gray, would you have paid that bill?

A. No, sir.

Q. It is testified by Mr. Catesby Jones, New York, on May 10, 1926, that you and I went to his office together and discussed with him matters relating to the Wash Gray. Is it true that you and I went there together?

A. No, sir.

Q. Did I at any time ever go to Mr. Catesby Jones' office, or go anywhere else with you and meet him?

A. No, sir.

406 Q. What was my personal advice to you about you going to Mr. Jones' office?

Objection: Mr. Dart:

We object on the ground of irrelevant, incompetent and inadmissible.

A. That I should not go.

Q. In your testimony at Galveston, you stated that you were invited to go to his office; do you remember how that invitation was extended?

A. Yes, sir.

Q. Please state it.

A. It came through a discussion between myself and Mr. Adams of the firm of Adams & Porter, 27 William Street, New York.

Q. Did Mr. Adams take you to the office of anyone concerned as an officer, agent or representative of one of the underwriters, defendants in this case?

A. Yes; a man by the name of—I don't know whether it is Buxton or what—out of McGee's office, had been

discussing settlement of this loss. They went in Mr. McGee's office and brought this gentleman into their office, where I was, and this gentleman suggested that he and Mr. Adams and myself go and talk to Mr. Jones,
407 as they had just settled a case something like this with the Bowie people of Beaumont, and as the McGee people were anxious to settle this case, they thought if we went to Mr. Jones and discussed it with him, he would see our side of it and approve the settlement.

Q. Do you remember whether or not Mr. Buxton got into telephonic communication with Mr. Jones?

A. I understand he did and made an engagement with Mr. Jones for us to see him.

Q. So that you were advised by Mr. Buxton that Mr. Jones would be pleased to see you at his office?

A. Yes, sir.

Q. And at that discussion that you speak of, Mr. Adams and Mr. Buxton was present; was I there?

A. No, sir.

Q. Nothing to do with it?

A. No, sir.

Q. So then, in going to Mr. Jones office, you were going, as you understood it, at Mr. Jones own invitation to discuss the question of a settlement of this case?

A. Yes, sir.

Mr. Grace:

We renew our motion to strike from the record the testimony of Mr. Jones, given in this case, as absolutely unwarranted as a matter of law, aside from any and every other consideration.

408 Q. Captain, you bought the Wash Gray, I understand from your previous testimony, from somewheres up near Pittsburgh?

A. I bought the Wash Gray and the Crescent from the Pittsburgh Coal Company.

Q. And at the time you bought her, she was being operated, as I recall your testimony, as one of the little harbor tugs up there on the Ohio.

A. At Paducah, Kentucky.

Q. Taking the Wash Gray, running free, under her own power, on inland waters, for which she was constructed, over which she was constructed to operate, what would you say, knowing her as you do, what would you say would be her maximum speed?

A. Oh, I should say, running light, her maximum would be twelve miles an hour.

Q. And was there any danger in running her through the inland waters at that speed?

A. No, sir.

Q. Captain, while the Wash Gray was in tow of the Freeport Sulphur No. 1, being towed at distance of approximately five or six hundred feet behind that steamer, would it have been prudent, in your opinion, on the part of the master of the Freeport Sulphur No. 1, with a sea running where the waves were, according to their estimation, from four to five feet high, counting from the trough of the sea to the top of the wave, to have attempted to tow that boat at a speed of less than nine miles an hour through that water?

409

A. As to the speed of the towing, that would have to be left entirely to the discretion of the captain or navigating officer.

Q. Now supposing for instance, the speed of the Freeport Sulphur No. 1 was cut down to a point where the tug might run off from one side or the other and get into the trough of the sea, what then would be the

probable consequences to the tug if while in, or approximately in, the trough of the sea, a heavy strain would then be put on her bitts by the towing vessel?

A. It would either pull her bitts out, or probably turn her over.

Q. Where the condition of the sea was such that these waves were running, say, at the height mentioned, with this little vessel being towed five or six hundred feet behind, do you think then that it would be more prudent for the master or navigating officer of the Freeport Sulphur No. 1 to keep a heavy or steady strain on the towline to prevent the tug from running
410 off into the trough of the sea?

A. Yes, sir.

Q. Captain, do you hold marine papers?

A. Yes, sir.

Q. What grade?

A. Master's license all inland waters and chief engineer for all oceans, all tonnage.

Q. Have you made many trips between American Gulf ports and Tampico?

A. Yes; many.

Q. Approximately how many, just roughly, offhand?

A. Oh, I would say, in my fifteen years, I have made fifty trips.

Q. How many?

A. Fifty trips.

Q. During that time, have you seen vessels in tow?

A. Yes.

Q. Many?

A. Yes, many.

Q. Where vessels are in tow, have you observed a tendency of the tow to run off and run up to one side or the other of the towing vessel?

A. They will always run from the wind, which throws them into the trough of the sea.

Q. Now where the steamer undertakes the service, is that a harder service or an easier service on a small craft like the Wash Gray than where the tow-
411 age service would be performed by an ocean going tug?

A. It is; in our practice we try to have our boats towed by ocean going steamers, because they are better able to take care of the tow than tug boats.

Q. They have the power?

A. They have the power and they have more fuel capacity. Fuel capacity is the thing we look to first, because we have often had tows from Galveston to Tampico to be out ten or twelve days.

Q. Is the Freeport Sulphur No. 1 a fuel oil burner?

A. Yes, sir.

Q. And carries not only her fuel oil for the trip, but fuel oil in her tanks for cargo?

A. Yes, sir.

Q. Captain, where water enters the hull of a tug, water being aboard after reaching a certain depth in there, would that set afloat the floor planks and other floatable objects in her?

A. Most of the skin of the ship is loose any how, on account of cleaning out trash from the limber holes.

Q. That would be the floor planks?

A. Yes, sir, we call them the skin.

Q. That would permit the planks to be lifted up readily to clean the limber holes, and cleaning out the limber holes is necessary?

412 A. To permit the water to get to the pumps.

Q. So that you can keep your vessel pumped out?

A. Yes, sir.

Q. Now those planks, with the water coming up to them, it would set them afloat?

A. Yes, sir, ordinarily.

Q. And with those planks afloat, with the rolling and pitching of the tug, was it possible then for the interior fittings of the tug to be damaged or injured?

A. That depends on how much water she has, sir.

Q. By that I mean an excessive amount of water?

A. Yes, sir, of course, with them floating around, of course.

Q. In other words, taking all water that might ordinarily be expected by the condition of those planks, it wouldn't be expected to give any trouble?

A. No.

Q. Taking the Wash Gray, in tow of the Freeport Sulphur No. 1 and coming along through the sea, whether it be an even rolling sea or a choppy sea, where that tug would dive into the waves from time to time, would the diving of the Wash Gray into the waves check up the Freeport Sulphur?

A. No, sir, she wouldn't feel it.

Q. Even if the steam would be immediately shut off from the engine of the Freeport Sulphur, would
413 that check up the Freeport Sulphur so as to stop the drag of the tug through the waves she plunged into?

A. No, sir.

Q. In other words, the momentum of the vessel would still carry her on?

A. Yes, sir.

Q. How long have you held master's papers, Captain?

A. Oh, more than twenty five years.

Q. And do you hold pilot's papers also?

A. Yes, sir.

Q. Do you hold engineer's papers?

A. Yes, sir.

Q. Both inland waters and Gulf and seagoing?

A. Yes, sir.

Q. In your opinion as a navigator, which do you deem the most prudent or proper course for a navigator to pursue, that is to say, whether to tow at such a slow speed that the tug would go off into the trough of the sea, or, on the other hand, to tow at a more rapid rate, so as to keep her head on up to the towing vessel?

Q. It has always been my experience and custom to keep enough strain on the tow line to keep the tug or my tow from sheering off.

414 Q. And if, in the judgment of the navigator or the Freeport Sulphur No. 1, towing her at the rate of nine miles an hour, was it necessary to do that, was it proper for him to do that under such circumstances?

A. Yes, sir.

Q. Captain, with the wind blowing from the north east at varying velocities up to, say, approximately twenty five miles an hour, and with the current running in the Gulf in a northerly direction at a velocity of about a mile and a half to two miles an hour, what kind of a sea is created there?

A. Well, it depends on whether they had any rain or not. If they had rain, the sea wouldn't be as high as it would be without rain.

Q. Well, would it be a smooth rolling sea, that is, an even rolling sea, or a choppy sea?

A. Choppy sea.

Q. Which character of sea is it that is hardest to tow through, a smooth rolling sea or a choppy sea?

A. A choppy sea.

Q. Where a tug or towing ship is equipped with a towing machine, is that an advantage to the tow?

A. Yes, sir.

Q. Now in the case of the Wash Gray, for instance, when she is being towed behind the Freeport Sulphur No. 1, if that vessel had been equipped with a
415 towing machine, at the time, say, when the tug would go head into a wave, what effect would that have on the towing machine?

A. The towing machine would slack up, give slack to the pressure brought on the tow line.

Q. That would relieve then the pressure on the tug itself?

A. Yes, sir.

Q. And allow her to come up freely?

A. Yes, sir.

Q. And after the head of the tug had come on up through that wave, what would happen with respect to the slack that had been let out?

A. The slack would be taken up. The towing machine is run on pressure, automatic pressure. If it takes 70 pounds pressure to pull the tow line out, to pull the tug back to whatever point it had been when she pulled her out would take 70 pounds, and the give and take from that point takes off the strain, eases it up and pulls it in.

Q. So that they can measure whatever strain they want on the particular tow line?

A. Yes, sir.

Q. And then when the towline comes up to that strain, automatically it would shut off?

A. Yes, sir, stop at that point.

416 Q. So that while the line was paid out and eased the pressure up, the moment the pressure was eased, automatically the machine would wind it back?

A. Yes, sir.

Cross Examination.

By Mr. Dart:

Q. Captain, what was the object of your going to New York on the occasion of your visit to Mr. Jones?

A. My visits to New York are monthly.

Q. May I ask you what was the object of your calling upon the insurance representative?

A. Adams & Porter had been my brokers for twenty years, not only marine business but other business.

Q. Why did you call on them on that occasion?

A. I didn't specially call on them on that occasion with reference to the Wash Gray.

Q. Well, you were trying to collect the insurance growing out of the loss of the Wash Gray?

A. We were very anxious to settle, and we were led to believe by McGee's attorney that he wanted to settle, wanted to pay; that if we went to see Mr. Jones, possibly he would agree, that they could make a settlement, but inasmuch as they had agreed with the
417 balance of the underwriters who had policies on that boat to join them in this thing and turn it over to Jones, why they couldn't do otherwise.

Q. Well, Mr. Jones represented all the underwriters?

A. I understand so.

Q. And you called upon Mr. Jones, with Mr. Adams, of Adams & Porter, your brokers, and with some gentleman from William H. McGee & Co.?

A. Yes, sir.

Q. Who represented one of the underwriters?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Your object in calling on Mr. Jones was to persuade him to recommend his clients to pay your loss?

A. That was not my reason. That was the suggestion of McGee & Co., that I join them in this discussion to see if we couldn't settle. It was not my suggestion at all.

Q. Well, regardless of whose suggestions it was of the conference with Mr. Jones, that was your position, you were demanding payment of your loss?

A. No; we were not demanding. We would like to have it though.

Q. You were requesting it?

418 A. No. The matter had been turned over to our attorneys, and we had been advised by our attorneys not to call on Mr. Jones, and these men came into Adams & Porter's office and suggested to me to call on Jones to see if we couldn't get a settlement.

Q. And when you called on Mr. Jones, you requested that he recommended his clients to pay the claim, didn't you?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Well, did you discuss the situation of the loss?

A. No, sir.

Q. What did you do when you got to Mr. Jones' office?

A. Well, he is the man that did all the talking.

Q. You had nothing to say?

A. Oh, I did say something, of course, along during the conversation.

Q. Did you make any statement regarding the cause of the loss or the circumstances of the loss?

A. No, sir.

Q. Did you give any reasons why the insurance companies should pay you?

A. Because they owed us.

Q. I understand, but outside of that general reason, did you give any other reasons?

A. No, sir.

Q. You didn't discuss in any way the circum-
419 stances under which the vessel was lost?

A. No; just general, that is all. We discussed the fact that the underwriters' surveyor surveyed that boat and gave us a certificate that she was ready to go to sea, and we took her to sea behind the towboat, which was set forth in the policies, Freeport Sulphur No. 1.

Q. Were you not asked to explain how it was, if those conditions were all true, that this vessel was lost?

A. No; that was not on either the vessel or the tug.

Mr. Grace:

We submit that at this time and prior thereto proofs of loss had already been submitted to the insurance people, and they knew what the position of the assured was.

Q. Captain Barbour, let me get this clear, because your testimony I think is rather misleading; do I understand that you consider that these gentlemen inveigled you into a conference—

A. No, I don't.

Q. —to take advantage of you?

A. No.

Q. Do you mean to say, when you got to this conference, you were not asked to give any explanation of the cause of the sinking of the boat or the
420 reasons why the insurance companies should pay their losses?

A. How could I discuss it when I was neither on the ship nor on the tug boat?

Q. No, but you were the executive head of the company that owned the boat.

A. Absolutely.

Q. And in position to know, either through your own knowledge or through reports of your representatives?

A. Yes, sir.

Q. And you mean to say you didn't make any statement or join in any discussion regarding the circumstances?

A. There was a general discussion, and most of the discussion was based on a settlement, simply because I had been asked in there by Mr. McGee, McGee's man, this man, whatever his name is, I have forgotten, had been discussing this matter with Adams & Porter, my brokers, for some time, and when they found out I was in town, they asked me down when I came in Adams & Porter's office, and suggested that we go and see Mr. Jones. He called Jones up and made an engagement and I joined Adams and went to Jones' office.

Q. The object in going to Jones' office being to persuade Jones that the underwriters should pay the loss; that is correct, is it not?

421 A. No, not to persuade; to try and show him we were entitled to our money after we had paid the premiums.

Q. Try to show Mr. Jones that you, as owners of the boat, were entitled to collect the insurance for the loss of the boat?

A. I was there at the suggestion of one of the insurers, one of the companies which had a $15,000 policy on that boat, who are ready to pay but, simply because Mr. Jones had got them all into a body, none of them could pay unless Jones said so.

Q. Well, your position was, your company was entitled to your money?

A. Absolutely; and we still feel that we are.

Q. You still feel that you are entitled to 100% of your money?

A. Yes, sir.

Q. And you have never moved from that position?

A. No, sir.

Q. That was the position you took in Mr. Jones' office?

A. Yes, sir; I wanted all or nothing.

Q. And you made that perfectly clear to Mr. Jones, did you not?

A. Yes, sir.

Q. Now there was a general discussion at that conference, was there not?

A. I don't remember just what was said.

422 Q. Didn't Mr. Jones urge various considerations as reasons why the insurance companies should not be called upon to pay?

A. No, sir, not to me.

Q. Didn't he express surprise that this vessel was lost under the conditions, if the conditions were as stated?

A. No, sir, not to me.

Q. Didn't he so state in your presence?

A. No, sir.

Q. And didn't you give as a reason for the loss of the Wash Gray that she was towed at an excessive rate of speed?

A. No, sir.

Q. Well, the result of the conference was you didn't persuade Mr. Jones to recommend his client to recognize the loss as one the insurance companies should pay; that is correct, is it not?

A. Yes, sir.

Q. That is correct?

A. They didn't pay.

Q. They didn't pay?

A. No.

Q. You don't mean to suggest or insinuate in any way that Mr. Jones was guilty of any unfair or improper conduct in conferring with you on that occasion, do you?

423 A. Well, I don't know just what you mean.

Q. I want you to make it clear, Captain Barbour, exactly what you mean in your testimony. The impression you give is that you consider somebody took advantage of you.

A. No, I don't.

Q. Because you say your counsel advised you not to go to the conference. Now I understand you to say you don't mean to cast any reflection or make any insinuation on that score?

A. It was not at my suggestion that the conference was held—remember that—the suggestion came from Mr. McGee's office.

Q. That is all very well, but you don't mean to cast any reflection on Mr. Jones or anybody at that conference?

A. Not at all.

Q. It was just a business conference held among gentlemen?

A. Yes, sir.

Q. At which nobody attempted to take advantage of anybody else?

A. Not that I know of.

Q. That is what I want to get clear?

A. All right.

Q. Now then, regarding the speed of the

424 Wash Gray, do I understand you to contend that it was proper for the Freeport Sulphur

No. 1 to tow the Wash Gray at a speed of nine miles an hour from the time she left Tampico until she arrived at Galveston?

A. I say that must be left to the discretion of the master of the towboat towing the ship.

Q. Well, assuming that the Freeport Sulphur No. 1 did maintain a speed of nine miles an hour on her voyage from Tampico until the vessel was lost, do you consider that that was proper towage?

A. I think so. She was out many hours before anything happened. If it had not been a proper speed, some thing would have happened before they got that far out.

Q. You have stated, I believe, that you preferred towage behind a steamer rather than sea going tugs because of the saving of time?

A. No; because the steamer is more able to take care of the tow than the tugboat would be, in bad weather.

Q. Well, one of the considerations also was the great saving of time in the length of the voyage, was it not?

A. No, sir; no, sir.

Q. Why is the steamship better able to take care of the tow in rough weather, Captain, than a tug

425 boat?

A. In the first place, she is heavy enough to hold the tow, and the next is she carries ample fuel and everything so that in case of bad weather they can held her in tow.

Q. Well, I take it then, your position is there was absolutely no negligence on the part of the Freeport Sulphur No. 1?

A. Not that I know of, or I would have heard of it.

Q. And based upon the facts that have been submitted to you, you consider that you towed the Wash Gray at a proper rate of speed?

A. I don't know anything about that. I still say it depends entirely on the captain's judgment.

Q. I mean under the facts of this case as presented to you, do you or do you not consider now she towed the Wash Gray at a proper rate of speed?

A. If I had been on her and saw the sea she was towing in, then I could answer your question.

Q. Then you are not in position to answer the question?

A. No.

Q. You don't know whether she towed the Wash Gray at a proper or improper rate of speed?

A. It depends entirely on the weather.

Q. However, if the speed was improper, if the tow was lost a result of the negligence of the Free-
426 port Sulphur No. 1, you would have no remedy against the owners of the Freeport Sulphur No. 1?

Objection: Mr. Grace:

I object to that, as a question of law.

Q. Well, under the terms of the contract, you would have no recourse against them.

Objection: Mr. Grace:

Still a question of law. For instance, the United States Supreme Court has held differently.

A. I don't get that.

Q. Read the question.

Mr. Grace:

I insist the question is a question of law, one for the Court to pass upon, if there was any negligence on the

part of the Freeport Sulphur No. 1, none of which we know anything about, and I move that the question be stricken from the record.

A. If the Freeport Sulphur No. 1 had been towing the Wash Gray too fast, at a speed that the Wash Gray could not stand, they would have lost her within the first ten hours.

427 JOHN D. GRACE, Jurat waived, testified as follows on behalf of the Libelant:

Statement by Mr. Grace.

Confirming my statement during the taking of the testimony of Mr. T. Catesby Jones, taken at the office of Bigham, Englar & Jones, I now testify that at no time, at no place, either in his office or any where else, did I ever accompany Mr. Barbour and discuss with Mr. Jones in Mr. Barbour's presence anything relating to the Wash Gray or relating to any other fact or circumstance of whatsoever nature. That Mr. Jones' recollection is entirely at fault, that no such visit as he testifies to was made by myself and Mr. Barbour, together or with anyone else.

I, personally and alone, called on Mr. Jones and discussed the question of a settlement of the Wash Gray. I was in hopes that the matter could be amicably adjusted, because the point raised by the underwriters down to that time, so far as I have been advised, was with respect to the seaworthiness of the Wash Gray and nothing else. During the course of the conversation, Mr. Jones referred to reports or information that the underwriters had secured and had furnishhed him,

suggesting that the tug had been towed at too
428 rapid a rate of speed, and that, therefore, he did not consider that the vessel was lost by reason of a peril insured against, and would decline payment. He even referred to some case occurring in New York harbor, which I do not now recall, where the towing vessel was held to have brought about the loss of the tow by towing the vessel at too high a rate of speed. He impressed me with the idea that he had secured information, or that his clients had advised him that they could produce testimony which would show that the vessel was towed at too high a rate of speed, and what I have said to him in my letter of November the 7th, which he introduced in evidence in his deposition, with respect to the speed of the Wash Gray, was based upon impressions gleaned by me from Mr. Jones himself at our conference which took place prior to that date. As Mr. Jones himself conceded in the taking of the depositions, I was not present on the Wash Gray, nor on the Freeport Sulphur No. 1, and had no personal knowledge of the conduct or doings of any of the men or officers or crew on either one of the vessels, in respect to their condition, the conditions of the weather, or otherwise, and I had no information which indicated,

that the Wash Gray had been towed at too high
429 a rate of speed, or that she had, as a matter of fact, even been towed at a rate of nine miles an hour. In fact, Mr. Clyde Barbour, the president of the Libelant Company and one of the parties named as beneficiary under the policy, had expressed himself as being satisfied that the Freeport Sulphur were entitled even to their tow bills in the case and had made payment of them. Bearing out my recollection that the only point that the underwriters had urged with respect to alleged non liability down to the time that I had the interview with Mr. Jones.

Offer:

I produce, offer and file in evidence letter from W. H. McGee & Co., William H. McGee & Co., Marine underwriters, who are the agents for one or more of the companies concerned in this case, addressed to John D. & M. A. Grace, and as indicating the position which Messrs. William H. McGee & Co. referred to as having been taken by a number of underwriters concerned herein, and as showing they were declining payment solely and exclusively on the alleged grounds of unseaworthiness.

Offer:

We offer, file and produce in evidence a letter from the Fireman's Fund Insurance Company, signed "H. A. Reed, Assistant Manager, under date of June 22nd, 1922, wherein the sole reason for non payment is based upon alleged unseaworthy con-
430 dition of the vessel, that letter being offered in evidence.

Objection: Mr. Dart:

We submit that the letter is the best evidence of its contents.

Offer: Mr. Grace:

As still further bearing out the position taken by the underwriters, I produce, offer and file letter from Carpenter & Baker, insurance brokers, representing one or more of the underwriters concerned in this case, written under date of June 22, 1922.

Still further produce, offer and file in evidence letter written by the Etna Insurance Company of Hartford,

Connecticut, dated at Hartford August 5, 1922, signed by its marine assistant secretary, as bearing out what I have stated about the then position of the underwriters.

Still further produce a second letter from the Firemen's Fund Insurance Company under date of August 11, 1922, for the same purpose.

And as evidencing the fact that although the proofs of loss show that the contract under which the Freeport Sulphur No. 1 was acting was made part of the proofs of loss filed with the underwriters during the month of June, 1922, it was not until on or about October 27, 1922, that the contention was raised
431 by the underwriters and then raised by practically all of them in practically identical letters as this one of the Fireman's Fund Insurance Company under dated of October 22, 1922, which is produced and filed in evidence, where the question of the terms of the contract are discussed as grounds for refusing same.

Cross Examination.

By Mr. Dart:

Q. Mr. Grace, you did call upon Mr. Jones alone?

A. Oh, yes.

Q. Endeavor to effect a settlement of the Wash Gray claim?

A. Precisely; we had had some correspondence and I told him I was going to.

Q. And following that correspondence, you exchanged two letters that were offered in evidence in connection with Mr. Jones' deposition?

A. Some time afterwards, and the contents and the reference to the speed of the vessel was gathered from what Mr. Jones was stating to me as the facts as he understood them.

Offer: Mr. Grace:

We offer and produce in evidence eleven different policies of insurance, one each executed by each one of the eleven different defendants in these con-

432 solidated causes.

We offer in evidence United States Government Public Charts of the Gulf of Mexico, showing various points and currents of the Gulf in the territory particularly involved in this case.

Proctor for Libelant announces at this time that they withdraw all exceptions which were urged to the taking of the deposition of Mr. Linnfield.

Mr. Grace:

Testimony closed.

433 Copy.

Fireman's Fund Insurance Company,
72 Beaver Street,
New York.

Dictated by: October 27th, 1922.
Mr. G. Ellenberg.
EM.....FF

Messrs. William H. Young & Co.,
15 William Street,
New York City.

Gentlemen:

Tug. "Wash Gray" June 9th, 1922.
Sunk Our Loss No. 74506—GE:

It has come to our attention that Captain C. A. Barbour agreed with the Freeport Sulphur Company that Freeport Sulphur "No. 1" should in no way be liable for

the loss or damage to the "Wash Gray." If we had known of this condition at the time the contract was made, we would not have approved the towing arrangements.

We have consulted Mr. Taylor, Tampico, to ascertain whether he had any knowledge of the terms of our assured's contract with the Freeport Sulphur Company, and Mr. Taylor assured us that he was not informed of this condition.

We consider this fact material to the risk and that your failure to disclose it to us was a concealment which vitiates the policy.

Yours very truly,
(Sgd.) H. E. REED,
Assistant Manager.

434 Copy.

Fireman's Fund Insurance Company,
72 Beaver Street,
New York.

Dict. by August 11, 1922.
Mr. H. E. Reed,
F.....FF

Messrs. Wm. H. Young & Co.,
New York.

Dear Sirs:

Tug "Wash Gray."

As a matter of record we wish to advise that we are holding your check for $146.25 representing premium in this case subject to your order, as we do not consider that our policy ever attached.

Yours truly,
(Sgd.) H. E. REED,
Assistant Manager.

435 Copy.

Aetna Insurance Company, Hartford, Conn.
Marine Department.
Hartford, August 5, 1922.

Messrs. William H. Young & Co.,
27 William Street,
New York City.

Gentlemen:

Claim No. 137—Tug "Wash Gray,"
June 7th, 1922.

Referring to your letter of June 20th, 1922, having now given this case attention we regret very much to advise that we are of the opinion the tug was in an unseaworthy condition on the trip in question and that we shall be obliged to deny liability on this account.

Yours very truly,

(Sgd.) M. W. MORRON,
Marine Assistant Secretary.

436 Copy.

Carpinter & Baker, Insurance,
3 South William Street,
New York, June 22, 1922.

Messrs. William H. Young & Co.,
27 William Street,
City.

Gentlemen:

Tug "Wash Gray" Premium.

Your favor of the 21st instant is received enclosing check for $191.25 which you have sent us on premium on policies which we issued on the above tug. Since this risk was written we have had an opportunity of seeing

the protest from which it appears to us that this vessel sailed in an unseaworthy condition, and that she was lost as the result of a peril which was excluded by the terms of the policy. For these reasons we are returning the check herewith.

Very truly yours,
(Sgd.) CARPINTER & BAKER,
Agents.

HWB.
Enc.

437 Copy.

Fireman's Fund Insurance Company,
72 Beaver Street,
New York.

Dict. by June 22, 1922.
Mr. H. E. Reed,
F.....FF

Messrs. William R. Young & Co.,
New York.
Dear Sirs:

Tug "Wash Gray."

We acknowledge receipt of your statement of the 19th inst. with check for $146.25 which you have sent us as premium on policy which we issued on the Tug "Wash Gray." Since this risk was written we have had an opportunity of seeing the protest, from which it appears to us that this vessel sailed in an unseaworthy condition and that she was lost as a result of a peril which was excluded by the terms of the policy. For these reasons, we are returning your check.

Yours very truly,
(Sgd.) H. E. REED,
Assistant Manager.

(Encl.)

438 Copy.

Wm. H. McGee & Co.,
Marine Underwriters,
15 William Street,
New York, July 7, 1922.

C. V. Mallen,
Phoenix Case 8390.

John D. & M. A. Grace,
401-2 Hibernia Bank Bldg.,
New Orleans, La.

Gentlemen:

Loss Tug "Wash Gray" Compania de Navegacion, Interior, S. A., and/or C. A. Barbour, Phoenix Case 8390.

We have before us your letter of June 27th which we have noted.

We take this opportunity to inform you that under date of June 19th, Messrs. Wm. H. Young & Co., who were the brokers in effecting the insurance with our company, forwarded us supporting documents in connection with the claim for total loss. The documents, however, do not include the original Phoenix Policy 2421, and we accordingly wrote to them under date of June 23d, requesting this document, in order to have our file complete. We have not heard from them up to this writing.

We questioned our liability under the terms and conditions of our policy in this case, which we understood is the same position taken by a number of underwriters who effected the insurance on this vessel. We accordingly have referred the case to our attorneys, Messrs.

Bigham, Englar & Jones, and of course will not take any action in the payment of this claim, until we are authorized by them to do so.

We are sending Messrs. Bigham, Englar & Jones a copy of your letter of June 27th, as well as a copy of this letter.

Yours very truly,
WILLIAM H. McGEE & CO.,
By (Not decipherable.)

439 DEPOSITIONS OF JOSEPH M. WALSH, FOR LIBELANT, TAKEN BEFORE CLARENCE A. STRAIN, NOTARY PUBLIC, COUNTY OF MOBILE, STATE OF ALABAMA, SAID WITNESS BEING FIRST DULY SWORN, AND EXHIBIT.

Filed May 31, 1926.

(Titles Omitted.)

Stipulation.

It is stipulated and agreed by and between the parties to the above named causes, that the deposition of the witness Joseph M. Walsh produced before Clarence A. Strain, a Notary Public in and for the County of Mobile, State of Alabama, on behalf of the Libelant, shall be taken by the said Clarence A. Strain under the notice attached hereto, and when duly transcribed by him, shall be treated in all respects as if taken with
440 all due formalities of law, signing, sealing, certification and return of the deposition to Court being waived.

It is further agreed that the original and one copy of the deposition taken, as aforesaid, on behalf of the Libelant, shall be charged as costs.

Signed this the 25th day of May, 1926.

PHILLIPS, COWLEY & GRESHAM,
Proctors for Libelant.

HARRY T. SMITH & CAFFEY,
Proctors for Respondents.

441 (Titles Omitted.)

Appearances:

Hon. Harry Pillans, Attorney at Law, Mobile, Ala., appeared as Counsel for the Libelant.

Messrs. Harry T. Smith & Caffey, (By Mr. Smith), Attorneys at Law, Mobile, Ala., appeared as Counsel for the Respondents.

The testimony of Captain Joseph Walsh, a witness called by the Libelant, and examined pursuant to the annexed notice, before me, C. A. Strain, a Notary Public in and for the County of Mobile, State of Ala-
442 bama, and the Commissioner named in the annexed notice and agreement of Proctors of Record, beginning at 10:00 o'clock A. M., on Monday, the 24th day of May, 1926, at the offices of Harry T. Smith & Caffey, located on the 7th Floor of the National City Bank Building, Mobile, Alabama, and the said witness, Captain Joseph Walsh, being by me first duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth in the said cause, hereinabove stated, now pending in the District Court of the United States for the Eastern District of Louisiana, did testify and say as follows:

443 JOSEPH M. WALSH, upon being first duly sworn, as a witness on behalf of the Libelant, testified as follows:

Direct Examination.

By Mr. Harry Pillans:

Q. Your name is Joseph M. Walsh?

Ans. Yes, sir.

Q. Are you a resident of Mobile?

Ans. Yes, sir.

Q. For how long a time?

Ans. Over 72 years.

Q. In what business in connection with shipping and towing have you been engaged in, say, of late years?

Ans. I have been in the stevedoring and towing business. I have been in the stevedoring business for over 45 years and in the towing business about forty years.

Q. Have you had anything to do with the conduct and management of any towboat company at Mobile?

Ans. Yes, sir.

Q. What company?

Ans. Well, I managed my own towboats for a number of years. Afterwards I worked in connection with a partnership with Hunter Benn and with Hartwell, and later went into a corporation known as the Mobile Towing & Wrecking Company, I guess about fifteen years ago.

Q. What proportion of the sea towing connected with the Port of Mobile or handled in the Port of Mobile was done by the various associations, corporate or otherwise, that you have been managing the towboats of?

Ans. Well, when we had competition in our towboat business, the other companies done sea towing as well as we did,—but today there is an opposition company

here—the Todd boats and they do sea towing as
444 well as we do, that is the Gulf Towing Company.

Q. During that time prior to the coming of the Todd boats here were there other boats managed by you in connection with the towing business, or engaged in the towing business?

Ans. There were.

Q. How many years ago would you say that covered?

Ans. About fifteen years.

Q. When you were the manager of the sea-going towboat or the corporation there?

Ans. Yes, sir.

Q. During your experience and practice as manager of towboats and towboat companies, have you been in the habit of towing, or have you made a practice of taking tows of vessels in the Gulf from port to port, either from one American to another American port, or between foreign ports,—or between American and foreign ports in the Gulf?

Ans. I have been towing from one American port to another American port, and I have been towing to Cuba so far.

Q. For how long a time have you been engaged in that sort of towing?

Ans. You mean in a foreign business.

Q. Yes,—foreign or coastwise,—either one?

Ans. Well I have been towing as I tell you,—I have been towing ever since—Am I to speak of my connection with the Mobile Towing & Wrecking Company?

Q. No; but the towing business that you have belonged to.

Ans. I have been towing them for the last 25 years at sea to foreign and American ports.

445 Q. In the practice of towing at sea in the Gulf, state whether or not there is any custom-

any arrangement or understanding or contract between the tug and the tow as to where the responsibility for loss from sea disasters or otherwise shall lie?

Mr. Smith:

I object to the question as calling for irrelevant, incompetent and immaterial testimony.

Ans. We would agree to tow a vessel—In towing from New Orleans, Pensacola, Tampa, or in the Gulf, I might say, we would make our arrangements with the Captain for towing his vessel for a lump sum price, and as a rule we always insisted and had the ship to furnish the hawsers,—the ship hawsers, and if we furnished the hawsers, we always charged extra for it, and we did as a rule charge extra for the use of our hawser but with the understanding that we are not responsible for it. We would say,—there she is, if you want to use her all right; we will not be responsible in the event of breaks.

Mr. Smith:

I move to exclude the answer of the witness because it is irrelevant, incompetent and immaterial.

Q. Now, as to your understanding about your hawser, state whether or not there was any understanding customary between the owner or managers of the tug and the tow as to reliability for disasters at sea?

Mr. Smith:

I object to the question as calling for irrelevant, incompetent and immaterial testimony, and for
446 the conclusions of the witness as to understandings of other people.

Ans. Well, I suppose you mean by that—are we responsible for the delivery of the vessel when we undertake to tow her or to deliver her at a certain port?

Q. Yes, sir.

Ans. We do not assume any responsibility for the tow. We furnish the power to tow the vessel, and we tow the ship at her own risk.

Mr. Smith:

I move to exclude the answer as irrelevant, incompetent and immaterial, and because it simply gives the witness' conclusion as to the legal effect of the towage.

Q. The question was this: Was that the understanding of the towboat people and people having towage done exclusively, or was it caried into the bargain for towage ordinarily?

Mr. Smith:

I object to the question as calling for irrelevant, incompetent and immaterial testimony and for the conclusion of the witness.

Ans. It was always understood that the towboat was not responsible for the safe delivery of the vessel.

Mr. Smith:

I move to exclude the answer as irrelevant, incompetent and immaterial.

It is hereby agreed between the proctors of record that each question propounded to this witness shall be considered as having been objected to on the ground that it calls for irrelevant, incompetent and immaterial testimond, and for the conclusions of the witness and the

mental operations of the witness, without the necessity of repeating the objection to each question, and that a motion to exclude each answer upon the same grounds shall be considered as having been made to
447 each answer.

Q. You say it is understood—do you mean by it was understood that that was the general understanding in that trade, or do you mean that it was customarily provided for in the agreement to tow?

Ans. Well, Mr. Pillans, in former years, in our towing agreement we never stipulated who was responsible but it was understood between the masters of the vessels and the owners of the tug boats that we were to furnish the motive power and not to be responsible for the vessel. For instance, I am going to tow a vessel from here to Pensacola or to Tampa. The vessel worth $200,000.00 or $150,000.00. I get $2500.00 for performing that service. Well, you don't suppose that I am going to be responsible for the safety of that vessel. It does not look reasonable. I am no insurer.

Q. You say in former years?

Ans. I say that for this reason,—in the last—I will say during the last war and since the last war, all the contracts that I have had for towing, we have had written contracts, and in those written contracts, it is specifically stated, if I remember right, that we are not responsible for the safe delivery of the vessel. It is also stated,—I have not seen one of them for a long time,—that we are not insurers and we give the option to the party who we contracted with to do the towing, the privilege of putting a man on our towboat, and
448 my captain would be subject to his orders, provided in his opinion, it did not endanger the safety of the tug or the crew.

Q. Now was that or not general in the Gulf towing business or practice?

Ans. As I told you previous to the war, we did not do a great of sea towing. We might tow probably eight, ten or twenty vessels during the year between one American Gulf port and another, but we never had written contracts with the captains as we have now.

Q. You say "Now."—are you confining yourself or not as to the practice of your towing concern, or are you speaking of the practice of towboats in general,—those in competition with you in the Gulf trade, including your company?

Ans. Well, you know, I could not very well say of any others. That is, I could not very well say what another man does. I could tell you what I do, but I am sure,—well I could not even say I am sure,—because I do not know, but I do know this, that we do not tow any vessels now, without a contract.

Q. Now you say then as I understand you, that that practice of making these stipulations dates back to the commencement of the world war?

Ans. Yes. Well, I would not state to the very commencement—but during the war, and since that war.

Q. During the duration of the war and since the war?

Ans. Yes.

449 Q. Can you produce any written contracts which you have or which your concern have made with regard to any tow in the Gulf, in which anything was said about insurance or liability of the tug, or the like; if so, produce it?

Ans. Here is the copy of the contract.

Q. Have you a copy of such a contract,—if so produce it.

Ans. This looks to me as the original.

Q. You can't say you have the copy, but you have the original?

Ans. This is a copy or an agreement that we had with Mr. Milton Reinsberg.

Q. Can you attach the original or will you furnish a copy?

Ans. Yes, sir; this contract has all been complied with.

Q. Please attach the papers you have in your hand as an exhibit to your testimony.

Ans. This was done in December, 1925. That is the date this contract was made. I remember we lost some of the barges we towed under that contract.

Q. You say you lost some of the barges?

Ans. Yes, sir; we lost two of them.

Q. Lost two of the barges covered by that contract?

Ans. Yes, sir.

Mr. Pillans:

Will you please attach this contract as an exhibit to your testimony.

The Witness:

Yes, sir.

This document was marked as Exhibit "A" to the testimony of the witness.

Cross Examination.

By Mr. Smith:

Q. You have only undertaken to testify as to your own doings or the doings of your concern, and
450 not as to the practices of any other concern, is that right?

Ans. That is correct.

Q. You do not know the practices of other concerns in this particular?

Ans. I do not.

Q. Now the form of the contract that you have here produced is the form that you ordinarily use when you enter into a written contract, is it not?

Ans. That form of contract was gotten up for me by Mr. Gregory Smith, when I was making a tow from Mobile to the south side of Cuba. I was towing some barges.

Q. And that is the one you have been using.

Ans. I have been using that ever since.

Q. How long have you been using that form of contract?

Ans. I think that is about eight years. Before the war was over.—how long ago was that. When was the war over? I mean the World War.

A. 1918.

Ans. Well, it was during the war,—before the end of the war, that we made this tow to Cuba, and I had this contract made, and I have been using it ever since.

Q. You do not mean to say that you have not made a number of tows on verbal orders very recently and right along, do you, for these local people here,—for instance, here is "Lake Indian," that you towed from Texas to Mobile in November, 1925, for Page & Jones. Mr. Jones testified that was towed on a verbal order to the tug,—is that true?

451 Ans. I did not make that agreement. I do not recall it. It was probably made with Captain Dorgan, who does a good deal of that work.

Q. Then there is the Murphy barges that were towed from Mobile to Tampa in December and January, 1925 and 1926, on a verbal order just over the telephone, as to what would you charge to tow those barges. Didn't you tow those barges on a verbal order?

Ans. I could not tell you because my son, Dick, I know did that work. But I could tell you this: He made that agreement and it was distinctly understood some way or another, that those barges were not at our risk when we towed them.

Q. Did you not know how that was understood?

Ans. It must have been understood with him that we were not responsible for the tow?

Q. Do you remember the conversation with him at all?

Ans. No; I do not know, but I do know the conversation that we had among ourselves in making those agreements, that we were not to be responsible for any barges that we towed around there.

Q. But you do not remember the conversation with the customer, Page and Jones?

Ans. No; I do not; I do not remember making the contract. I do not remember talking about it.

Q. Now, the "Isabella C. Harris," towed from Mobile to Gulfport in November, 1925,—do you remember that?

Ans. No.

Q. Isn't it true that you had a great deal of towing for Page & Jones on verbal orders over the tele-
452 phone?

Ans. Yes.

Q. And haven't you done a lot of it recently for Captain L. A. Scott in the same way?

Ans. Yes; we tow Scott's vessels. We towed a vessel down the other day for Scott.

Q. And for the Van Heynegan Brokerage Company too?

Ans. Yes, sir.

Q. They simply picked up the phone and asked you for a price, did they not?

Ans. Yes, sir.

Q. And you gave them a price?

Ans. Yes, sir.

Q. And they said "yes," and you went on ahead and did the towing?

Ans. Yes. We will tow that vessel for you from Mobile to Gulfport or from Gulfport to Mobile for so much money, but there is an understanding that we are not responsible for that vessel.

Q. When did you communicate with Mr. Jones any such understanding or have any such agreement with Mr. Jones of Page & Jones?

Ans. I do not recollect. You know, I do not handle the entire details of the towboat company. They made tows without my knowledge. My son or Captain Dorgan very often call and ask me about them and prices and things of that sort, yet I do not give all of my time and attention to the towboat business.

Q. I understand that, but you do not mean to deny that you do constantly tow on verbal orders?

Ans. We do towing on verbal orders.

Q. You do that through other people, and
453 you do not just simply know what occurs between those people?

Ans. I do not know always just what occurs, but I do know this, that it has always been understood that we are not responsible for a vessel when we are towing her from one port to another.

Mr. Smith:

I object to the statement by the witness that he knows it is always understood that they are not responsible for the vessel, as calling for his conclusions as to the understanding of the persons.

Q. Now the understanding that you speak of is simply an understanding that you are not warrantors or guarantors for the safety of the vessel,—is that what you referred to?

Ans. Yes, sir.

Q. You do not mean to say that you are not responsible for your own wrong, if you do a wrong yourself,—for instance, suppose your Master or man in charge of your tug got drunk and deliberately ran into the side of the other vessel or tow?

Ans. That he was going to tow?

Q. Yes, because he was drunk and it was his own fault,—you will not contend that you would not be responsible for that?

Ans. No; I would be responsible.

Q. In other words, the understanding that you speak of, as I understand you, that you were not to be responsible for any perils of the sea, or any casualty or anything else, except your own fault.

454 Ans. Yes, sir.

Q. That is your understanding?

Ans. Yes.

Q. But you do not pretend that there is an understanding that you will not be responsible notwithstanding how much fault you may be at?

Ans. No, sir.

Q. When you undertake to tow a vessel, you undertake to tow it in an ordinary reasonably prudent manner, do you not?

Ans. Yes, sir.

Q. And you will say that you are responsible for your own faults if you do not exercise reasonable care, if damage is done, by reason of your own fault,—I mean, and not by reason of any peril of the sea, or anything of that kind?

Ans. I do not just understand you.

Q. Well, I will put it this way: the tow may receive damage in dozens of different ways, of course, and a tug boat might be an insurer of the safety of the vessel; in other words, take the ordinary risk, or it might not, according to the understanding of the parties. I understand from what you say that it is understood that you do not take those sorts of risks, but take the risk only of exercising care and reaonable care in your work,—That is your understanding is it?

Ans. Yes, sir; that is my understanding.

Re-Direct Examination.

By Mr. Pillans:

Q. In other words, you assume the risk of furnishing an adequate seaworthy boat and a prudently skillful crew?

455 Ans. Yes. We use licensed officers.

Mr. Smith:

I object to the question on the grounds already stated and also upon the ground that it is leading and state conditions different from those already stated by the witness, and move to exclude the answer on the same grounds.

Ans. (Continued): You asked me if I had reasonably good men, and I said all of our officers are licensed.

Q. And you put the liability of the other risks on the tow?

Mr. Smith:

I object to the question because it is not a question but an instruction to the witness, and is leading, and at variance with the statement of the agreement and practice as already given by the witness.

Ans. Yes, sir.

The witness was thereupon excused.

456 This contract made and concluded in the City of Mobile, Alabama, on the 12th day of December, 1925, between the Mobile Towing & Wrecking Company party of the first part as Owners of the Iron Tug "Echo" of Mobile, Alabama, of the burden of 68 tons register or thereabouts, and No. 4267 American Records of the first part, and Milton Reinsberg, of the second part..

Witnesseth: That the party of the second part hereby agree to the hiring of said tug Echo from the party of the first part, to tow two or more wooden barges from Mobile, Alabama, to Key West, Florida, on the terms following:

The party of the second part agree to pay to the party of the first part or agents for the use of said tug Echo, $250.00 per running day United States gold or its equivalent; tug's time to commence the day tug "Echo" leaves Mobile and to cease on its return to Mobile, unless lost by perils of the Sea, in which event hire to cease when tug it [is] lost.

It is further agreed that the said Milton Reinsberg, is to furnish all connecting hawsers or tow lines required between the vessels and/or barges required for making the tow, and the said tug and/or its owners are to furnish the towing hawsers, but the said tug nor the Owners are to be held responsible for any damage or loss that may accrue from the parting of any hawsers furnished by said tug and/or its Owners; and the said Milton Reinsberg, for itself and its insurers hereby release the said tug and/or its Owners from any damage or loss which may be caused by any defect of hull and/or
457 breaking of machinery of said tug Echo.

That the said Milton Reinsberg, shall furnish a licensed or competent man to go on the tug Echo, who shall in stress of weather confer with the Master of said tug Echo, and who will be guided by his instructions unless by so doing the Master of said tug Echo considers that he is jeopardizing the safety of said tug Echo and endangering the lives of the crew.

It is further agreed and mutually understood that the said tug Echo and/or its Owners are not to act as an "Insurer" for the safe delivery of said tug Echo's tow to its point of destination, but is only to furnish motive power therefor and should the said tug Echo for any reason whatsoever be unable to deliver the said tow at Key West, Florida, the said tug Echo is to receive compensation for the actual time it is in service to and from at the rate of $250.00 per day.

The party of the second part shall furnish a Bank Guarantee of Two Thousand Dollars in advance of this towing contract and the remainder if any to be paid when the tug Echo returns to Mobile, Alabama.

Given under out [our] hands and seals, in duplicate, at the City of Mobile, State of Alabama, this 15th day of December, 1925.

MOBILE TOWING & WRECKING COMPANY,
By J. M. WALSH, President.
MILTON REINSBERG,
By M. B. SPOTSWOOD.

Witness:

.....
.....

458 NOTE OF EVIDENCE FOR RESPONDENTS.

Filed Jun. 2, 1926.

(Titles Omitted.)

Notes of Evidence for Respondents.

On behalf of respondents, we produce, offer and file in evidence the following depositions and exhibits.

A. Depositions of officers of SS. "Freeport Sulphur No. 1," taken in Galveston on July 29th, 1924, and exhibits identified by said witnesses, namely:

1. C. G. Haslund, master.

2. E. C. Marshal, chief officer.

3. Nello Viacava, first assistant engineer.

4. Log of SS. "Freeport Sulphur No. 1."

B. Depositions of insurance brokers and representatives taken in New York, on May 10th, 1926, and exhibits identified by said witnesses, namely:

1. William H. Young Broker for libelants.

2. Reginald L. Billin, assistant manager of Vessel Agency Inc.

3. T. Catesby Jones of Bigham, Englar & Jones.

4. Harry P. Winters of Carpinter & Baker.

5. John Joseph Barghusen of William H. McGee & Company.

6. Edward B. Bannister of Globe & Rutgers Fire Insurance Co.

7. Charles Rosebock of Talbot Bird & Company.

8. Binder, respondents, exhibit 1.

9. Copy of Hartford Fire Insurance Company policy, respondents Exhibit No. 2.

10. Copy of Northwestern Fire & Marine Insurance Company policy, respondents Exhibit 3.

11. Letter dated November 7, 1922, from John D. Grace to T. Catesby Jones, respondents Exhibit 4.

12. Copy of letter from J. Catesby Jones to John D. Grace, respondents Exhibit 5.

C. Depositions of witnesses taken in Mobile on May 20th, 1926, namely:

1. Neander Cunningham.

2. Thomas C. Thompson.

3. Jake H. Jones.

4. J. G. Murphy.

5. Leslie Bodden.

6. L. A. Scott.

D. Depositions taken in New Orleans on May 19th, 1926, to-wit:

1. Rowland Linnfield of American Bureau of Shipping.

Dated at New Orleans, Louisiana, May 31st, 1926.

Respectfully submitted,
DART & DART,
ANDREWS, STREETMAN,
LOGUE & MOBLEY,
BIGHAM, ENGLAR & JONES,
Proctors for Respondents.
(Sgd.) HENRY P. DART, JR.,
Of Counsel.

459 DEPOSITIONS OF C. G. HASLUND, E. C. MARSHAL AND NELLO VIACAVA, ON BEHALF OF RESPONDENT, AND EXHIBITS ATTACHED, TAKEN BEFORE W. D. BAGGETT, NOTARY PUBLIC, GALVESTON COUNTY, TEXAS, SAID WITNESSES BEING FIRST DULY SWORN.

Filed May 31, 1926.

(Titles Omitted.)

460 Stipulation.

It is agreed by and between both parties hereto, represented by their counsel, that the testimony taken shall apply with full force and effect in each and every one of the

above entitled and numbered causes, as if taken in each particular case. It is agreed that the testimony shall be taken down in shorthand by Mary Dickey, the witnesses having been theretofore sworn by W. D. Baggett, a Notary Public in and for Galveston County, Texas; and that the signing, sealing and certification of the depositions are waived; that a carbon body shall be made for counsel for Libelant, to be taxed along with the originals as part of the cost of Court.

Appearances:

For libelant, Messrs. John D. & M. A. Grace, by Hon. John D. Grace.

For Respondents, Messrs. Dart & Dart by Hon. Henry P. Dart, Jr.; Messrs. Andrews, Streetman, Logue & Mobley, by Robert H. Kelley, Proctors for Re-
461 spondent.

Depositions and answers of the witnesses C. C. Haslund, E. C. Marshall and Nello Viacana, witnesses in behalf of Respondent, taken in accordance with the accompanying notice, before Mary Dickey, the witnesses having been theretofore sworn by W. D. Baggett, a Notary Public in and for Galveston County Texas, on the 29th day of July, A. D. 1924, at the office of Messrs. Terry, Cavin & Mills, Eighth Floor, Sante Fe Building, Galveston, Texas (Galveston County, Texas).

And the said C. C. HASLUND, after having first been duly sworn by W. D. Baggett, a Notary Public in and for Galveston County, Texas, testified as follows:

Direct Interrogatories.

Questions by Mr. Kelley:

Q. Your name is C. C. Haslund?

A. Yes, sir.

Q. At present you are the master of the Steamship Freeport Sulphur No. 1?

A. Yes.

Q. How long have you been master of that vessel?

A. Since about June, 1920. Sometime in June. I don't recall the date.

Q. What kind of a license have you, Captain?

A. Unlimited master's license.

Q. When did you receive that license?

A. 1919, it was.

462 Q. How long have you been a seafaring man, Captain, and what, in a general way, has been your experience?

A. I went to sea in 1901 and I possessed an unlimited and chief officer's license from the old country before I came here in 1905, and have taken out a license in this country. Continuous service for twenty-four years at sea.

Q. Were you the master of the Steamship Freeport Sulphur No. 1 in June, 1922, on her voyage from Tampico to Freeport, when the Mexican Tug Wash Gray was taken in tow?

A. Yes, sir.

Q. Have you with you the rough log of the steamship covering that vessel?

A. I have.

Q. I mean covering that voyage of the vessel.

A. Yes.

Q. Referring to the log, Captain, when did you leave Tampico?

Mr. Grace:

Have you any individual knowledge of the date, or must you refer to that log to determine those dates? I mean do you remember them without having to look to your log?

A. Not very well. It is two years ago and the dates I don't remember without looking at the log. Referring to the log the time of departure is six P. M. June 6th.

Q. 1922?

A. 1922.

Q. In what manner was the Wash Gray towed, that is, with what kind of a hawser?

A. It was towed with two parts of an eight
463 inch manila line.

Q. By an eight inch line you mean eight inches in circumference?

A. Eight inches in circumference, yes, sir.

Q. And that was doubled?

A. Doubled.

Q. About how long was the hawser between the steamship and the tug?

A. Approximately three hundred feet.

Mr. Grace:

How many feet?

A. Approximately three hundred feet.

Q. You say you left Tampico at six o'clock in the evening?

A. Yes.

Q. What was the character of the weather when you left Tampico?

A. It was a light easterly breeze, calm sea and clear weather.

Mr. Grace:

Calm sea?

A. Calm sea.

Q. Was any difficulty of any kind encountered so far as you know during that night?

A. No.

Q. Did the same kind of weather in general continue through the night?

A. Yes it continued.

Q. And during the following day, that is, up to night fall, what was the character of the weather?

A. It was: Light easterly breeze, continued all day, and partly cloudy at times. The sea was smooth with a light easterly breeze and partly cloudy, smooth
464 sea with light swell.

Q. Now, was any difficulty at all encountered by the tug during that day, which was the first day out of Tampico?

A. Not so far as was known on the towing ship.

Q. When did you first have any knowledge that the tug was in difficulty?

A. (Referring to the log): About eleven thirty P. M. on June 7th.

Q. On June 7th?

A. On June 7th.

Q. Now, is that entry in your handwriting in the log, or in the handwriting of somebody else?

A. In my own handwriting.

Q. What is that entry in the log? How does it read?

Mr. Grace:

Objected to on the ground that the log is a self-serving document; entries therein are so likewise; we move that all testimony with respect to entries therein contained be stricken out.

Q. Read the entry. Just read that entry that starts 11:30 P. M.

A. 11:30 P. M. slow down engine, crew on Tug Wash Gray waving red light.

Mr. Grace:

Did what, Captain?

A. Waving red light.

Q. Waved?

A. Waving red light.

Q. Go ahead.

A. "11:45, Mexican crew on Tug cut hawser."

Q. Go on, read it as far as it is in your handwriting?

A. "12:00 all hands on deck heaving in
465 hawser; steaming up alongside Tug; Mexican crew demanded to be taken off as Tug was short of fuel and leaking badly. 1:45 A. M. June 8th, lowered port lifeboat with chief officer and five men. 2:25, boat returned to ship and reported no water and oil on the Tug and boilers killed and crew demanded to be taken off as Tug was leaking badly."

Mr. Grace:

At what time was that entry?

A. 2:25 A. M.

Q. What is the next entry?

A. "2:45 A. M. June 8th. Lifeboat returned to ship with the Mexican crew of Tug Wash Gray, six men in all."

Q. Read on.

A. "Standing by until daylight. 5:15 As Tug did not appear to settle deeper lowered a lifeboat and chief officer and chief engineer going on board Tug for ex-

amination. 6:00 A. M. towing hawser made fast on Tug, proceeded slow speed. -10:20 unable to get up steam in Tug, water gaining too fast, gaining so fast that further work is useless. Lifeboat returned to ship and taken on board. 11:12—" this is not in my own handwriting—this last entry—

Mr. Grace:

We object to the witness referring to any entry for the purpose of refreshing his memory when those entries were not made by himself.

Q. In whose handwriting does the next entry appear?

A. The third officer's.

Mr. Grace:

The foregoing objection was made in addition to the other obligations to the non-admissibility of
466 the evidence with respect to those entries made by the Captain.

Q. You say this next entry was made by the third officer?

A. The third officer, yes, sir.

Q. Do you know whether or not the entry was made in the regular course of business?

A. Yes.

Q. It was made, of course, under your supervision as the master of the vessel?

A. Yes.

Mr. Grace:

Objected to as leading and suggestive, and we move that the question and answer be stricken out. We record,

too, that the log which the Captain has before him is the rough log and not the official log of the ship, and we call for the official or smooth log, not the scrap log.

Mr. Kelley:

That has already been put in. You remember Mr. Mims put that in at Houston.

Mr. Grace:

He didn't make the entry, he wasn't on the ship.

Q. In writing up the log of your vessel, Captain, how is the smooth log made up?

A. The smooth log is written by the chief officer and signed by the master.

Q. From what are the entries taken?

A. From a copy of the rough log.

Q. It is a copy of the log?

A. It is an absolute copy of the log.

Q. And when the smooth log is made up, what is done with it?

A. The smooth log is turned in to the owners of the ship at the end of each month.

467 Q. Where is it delivered to the owners?

A. Wherever the ship may be, or in this case, at Freeport.

Q. It was delivered to the Company's officers at Freeport?

A. Yes.

Q. And do you know what officers of the Company would have custody of it in Freeport?

A. Well, it should come to Mr. Mims.

Q. Mr. L. Mims?

A. Yes, sir.

Q. Now, going back. For reference the stenographer may note that the smooth log was offered in evidence as

Respondent's Exhibit No. 1 in connection with the testimony of Mr. L. Mims, and a copy of it may be found at page 55 of the testimony taken at Houston, Texas, before Mr. C. R. Triay on or about June 14, 1923.

Mr. Grace:

Let me see the testimony. Have you got that part where Mr. Mims had—do you know the particular page? My impression is that it was a loose sheet in the log. I merely want to see whether I am correct in my recollection.

Mr. Grace:

We will call to the attention of the Court that when the purported record of the alleged events, which was said to be entered in the smooth log, was offered, the Court will note at pages 32, 33 and 34 objections made by the Libelant to the introduction thereof, which said objections are persisted in at this time, and the reading of the ship log is the best evidence if any of the entries therein are at all admissible.

468 Q. Captain, the document which you have before you is the book of original entries made of the events as they transpired on that voyage, is it not?

A. It is the rough log of the ship, yes, sir.

Q. Are the entries made by the officer of the boat as they occur?

A. Entries are made every four hours usually, and on occasions like this, they are made as soon as they occur.

Q. That is the original log which you have before you?

A. The original log.

Mr. Kelley:

The respondents now offer in evidence all of that portion of the log now in the witness' possession relating to this particular voyage, commencing with its departure from Tampico and terminating with the arrival at Freeport.

Mr. Grace:

What you have here is nothing but the scrap or rough log?

A. The scrap log.

Mr. Grace:

We still persist in our objection that the papers are not admissible and move that everything in relation thereto be stricken out, and insist upon our call for the best evidence.

It is agreed by the parties, that subject to the objections which have been made here, and in the testimony of Mr. Mims, that the stenographer may make a copy of the rough log now in the possession of Captain Haslund, copies to be furnished counsel, and that the rough log can thereupon be returned to Captain Haslund.

Mr. Kelley:

The portion of the log so offered in evidence may be marked Respondent's Exhibit No. 2.

469 Q. Captain, when these Mexicans waved the red lantern during the night and cut the hawser, what was the condition of the weather? The sea?

A. The condition of the weather was the same as the entries in the log. At eight o'clock it was: Light easterly breeze with squalls and increasing sea, moderate swell but increasing.

Q. Increasing in size?

A. Yes.

Q. Now, when the lifeboat was first launched and went over there to take the crew off the tug, was any difficulty experienced on account of the sea or the wind, or anything else, in launching the lifeboat from your vessel?

A. No, the usual precautions were taken, the usual precautions are taken no matter what kind of weather it is; we always do it about the same way. There were no difficulties in launching the boat. We always put the ship in a certain position.

Q. You launched the boat on the lee side?

A. On the lee side, but without regard to the swell, and so there is no difficulty in launching the boat.

Q. Now, the following morning, when daylight came on, what was the character of the weather? Had it changed, or was it about the same—that is, the morning the tug sank?

A. Light moderate squalls and cloudy, and so far as I can remember, the swell was about the same.

Q. What is your best recollection of the maximum velocity of the wind from the time that the
470 hawser was cut, up to the time when the tug sank?

A. Probably twenty-five miles an hour, not to exceed twenty-five miles.

Q. Now, the log says that the tug was short of fuel and leaking badly. How did you get the information that the Tug was short of fuel?

A. In running up alongside the tug—it was a dark night and we couldn't get very close—I could just holler

through the megaphone and they were unable to understand English and I was unable to understand Spanish and it made it necessary for me to get hold of someone who could translate what was said.

Mr. Grace:

I object to anything alleged to have been said by anyone purporting to be able to translate, or purporting to translate anything said by anyone on board of the vessel, all of which we submit is hearsay evidence, and we move that it be stricken out.

Mr. Kelley:

The testimony is offered by the Respondents for what it may be worth. Go ahead with your answer.

Mr. Grace:

We still insist that the testimony is incompetent and inadmissible and move that it be stricken out.

A. One of the firemen acted as interpreter.

Q. You used one of your firemen as an interpreter and that was the information he gave you—that the Tug was short of fuel and leaking?

A. That was the information he gave me.

Mr. Grace:

The same objection to this as was urged just immediately previous.

471 Q. Now, after daylight came on, you sent your chief engineer over to the Tug to make an inspection?

A. Yes.

Q. And what was his name?

A. The chief engineer's name was James A. Fulford.

Q. F-u-l-f-o-r-d?

A. Yes, sir.

Q. He isn't employed on your vessel at the present time?

A. No, sir.

Q. Do you know where he is?

A. His home is in Mobile, but being a seafaring man there is no telling where he may be.

Q. Where was he the last time you heard from him?

A. I haven't heard since that.

Q. I see. Now, at the time the Tug sank, and up to that time, during that morning, about how high would you say that these seas or swells were, from crest to trough?

A. Well, it is rather hard to guess, but I should judge four or five feet, just a moderate swell.

Q. Of course you didn't take a yardstick and measure them?

A. I didn't take a yardstick or any other stick.

Q. That is just your best judgment?

A. Yes, sir.

Q. Now, at what speed was the Tug towed from the time you left Tampico up until the time they cut the hawser? Approximately?

A. Approximately nine miles an hour.

Q. Nine miles or nine knots?

472 A. Nine miles an hour, that is, through the water she was making ten and one-half miles on account of the strong current with us.

Q. In what way do you estimate that speed?

A. By observation.

Q. When was an observation made after you left Tampico?

A. At noon the following day.

Q. Was that the last observation that was made? Prior to the time when the Tug sank?

A. As far as I remember, yes.

Q. By that observation you determined your position?

A. Yes.

Q. And calculated the distance from that position to the point of departure?

A. Yes.

Q. And dividing the miles by the running time you arrived at your statement that the average speed was about nine miles? Was that the process?

Mr. Grace:

The Captain said nine miles through the water; he was running with a strong current. Just explain the process, Captain by which you reached that conclusion.

A. We take, as you state, the distance between the point of departure and the observation, and divide by the number of hours, and this will give us the average speed over the current.

Q. Average speed over the current?

A. Yes, and by experience we judge the current.

Q. At the time of the year the average current along there is in a northward direction about two
473 miles, is it not?

A. It varies from one to two miles.

Q. And after you made that observation at noon on the seventh, until the time when the hawser was cut, about half past eleven at night, did your vessel maintain approximately the same speed that she had maintained since leaving Tampico?

A. Yes.

Q. So that during the time, your judgment is that the speed at which the Wash Gray was towed through the water was at about nine knots an hour?

A. Towed through the water at approximately nine knots an hour, yes.

Q. How long have you been running between Freeport and Tampico?

A. I was master about four years, and previous to that time about three years.

Q. About seven years altogether?

A. Approximately.

Q. Was the weather which you encountered on this trip up to the time the Tug sank usual or unusual?

A. Not unusual. Slight increase in swell, squally weather.

Q. When you say "squally weather" what kind of squalls do you mean?

A. Rain squalls accompanied with wind puffs.

Q. Did you see the tug take any water over her decks prior to the time the hawser was cut?

A. No.

474 Cross Interrogatories.

Questions by Mr. Grace:

Q. Captain, in this rough log, have you got the location of your vessel as determined by observation?

A. At noon, the day of the sinking.

Q. So, from that you are able to approximate your position in the Gulf at the time that the Wash Gray sank?

A. Approximately, yes.

Q. Now, I have here, Captain, a weather bureau chart, prepared by the United States Office, which gives the longitude and latitude and the lines, and I would

ask you to take your log and mark off the position of your vessel—I will give you a pencil here in a minute—in this green pencil (handing the witness the chart). If there is anything you need for the purpose of finding your position—

Mr. Kelley:

You want the position at the time the Tug sank?

Q. The position at the time the Wash Gray sank.

A. This is such a small scale that it would be only approximate.

Q. Now, Captain, as requested, you have run a course line from Tampico?

A. Approximately so.

Q. From Tampico toward—

A. Tampico to Freeport.

Q. To Freeport, and on that line you have an "X" marked in green pencil and that "X" you have marked in green pencil indicates the position of the Freeport Sulphur No. 1 at what time?

A. At the time of the sinking.

Q. Of the Wash Gray?

475 A. Yes.

Q. Now, Captain, could you refer to your log book and state approximately about what that position is in the Gulf?

A. Approximate position, latitude 27.30 north 95.50 longitude west.

Q. Now, I wish, Captain, you would mark on that chart in a red pencil the position 28.56 latitude and 94 longitude, not with respect to your vessel being in that position, but just find that particular point and indicate it on that chart there.

A. There is no scale on this. This is just a rough guess.

Q. Captain, don't you find a scale right there showing that latitude every five degrees?

A. Every five degrees, but that is every three hundred miles.

Q. And up at the top, don't you find a scale?

A. That is kilometers—and statute miles.

Q. With the dividers you have no difficulty in dividing up your space?

A. This chart is not made for finding positions, and these positions are not correct to miles, they are only figured in degrees.

Q. But after all, every degree has a certain significant measurement that can be reduced to miles or meters, or any other method of measuring?

A. Yes, but it is beyond me, I think. 28.56 it seems —I can see where 28.56 is going to put this up in the country.

Q. 28.56 would be a little over 28 and one-half.

Mr. Kelley:

Practically twenty-nine.

476 A. Well to approximate it—(marking on map).

Q. Put that in red.

A. That is very approximately; that may not be put within fifty miles. Thirty is the nearest we can get to it.

Q. In other words, that is the best location you can get on this chart?

A. Yes. 28.56 latitude, 94 longitude.

Q. Captain, if you will take this worksheet and give me the location of that.

A. This is very approximate.

Q. Now, then, Captain, take this rough sheet again before figuring on the smooth one, and give me a position on there to the best of your ability with that map before you, of 25.10 latitude and 87.16 longitude.

Mr. Grace:

The chart marked by the Captain as requested is now marked by the stenographer for purposes of identification as "Libelant's Exhibit Haslund No. 1."

(The chart referred to has been so marked by the stenographer as "Libelant's Exhibit Haslund No. 1.")

Mr. Kelley:

We are uncertain whether we will insist upon the objection, because we can't tell what the purpose of the offer is, but we make, tentatively at least, this objection: That the chart is obviously a hydrographic chart and not a chart made for the purpose of plotting position, and the witness has not been furnished with a scale, and the witness has stated that the positions which he has marked on the chart are only approximately
477 correct and they are not marked with that exactitude or identity which he would mark a chart, or the course or position of a vessel, or other object at sea, and therefore it is not an exact plotting of the positions referred to.

Q. Captain, wouldn't you say that considering the different scale, the latitude and longitude, and considering the Gulf of Mexico there, for instance, and at the time you charted it, that you have done it to the best of your ability on that character of chart?

A. On that character of chart, yes.

Q. And to the best of your ability on the chart, and to the best of your ability with the instruments furnished you for the purpose?

A. Yes.

Q. You have a full set of drawing tools there, have you not?

A. Yes.

Q. And you had parallel rules present for the purpose of finding your position?

A. Yes.

Q. And you have had angles, for instance, for determining any angle or lining out a regular line?

A. Yes, but—

Q. What were you going to say?

A. The scale is too small for any such purpose; it is marked to only five degrees; it is scaled to statute miles there.

Q. By using the scale on the side can't you fix the latitude and longitude?

478 A. That is not degrees.

Q. That is millometers?

A. Yes.

Q. And that extends all along the chart, both sides, top and bottom?

A. Yes.

Mr. Kelley:

Captain, have you had any instruments offered you here by which you could mark off on the chart 27 minutes or 16 minutes, or any other particular distance?

A. No.

Mr. Kelley:

That is all.

Mr. Grace:

He cannot measure off minutes on that chart? Why, Captain?

A. Because it is too small. A minute on that chart is a needle point.

Q. In other words you couldn't mark off 57 minutes?

A. No.

Q. You could with these dividers here. If you will notice, Captain, the dividers, the points come absolutely together.

A. Yes.

Q. So that any break at all between the point would indicate minutes whatever that might be, however wide that might be?

A. Yes, but on a chart like that on such a small scale, to do an exact work of it you would have to divide up the scale miles into statute miles, which I
479 am not familiar with.

Q. Captain, you have been a seafaring man for how many years?

A. Since 1901.

Q. Beg pardon?

A. Since 1901—twenty years.

Q. You have been making observations at sea for how long a period of time?

A. Since 1916.

Q. Since 1916?

A. Yes, since 1916.

Q. You have been plotting off positions on charts, plotting off courses of vessels on which you are navigating on charts, during how long a period of time?

A. I have been a master for four years.

Q. You have no doubt, have you, about your being competent to do that?

A. I have no reason not to think so.

Q. You have found that the plotting that you have done and the courses you have run have all turned out to be correct?

A. They have been.

Q. Now, Captain, when the Wash Gray was taken in tow with two parts of eight inch manila line, did you observe the condition of that line to see whether it was sufficient for the purpose?

A. In my judgment it was the best we could offer.

Q. As far as the line furnished was concerned, it was as good as any that could have been secured for that purpose?

A. Yes.

480 Q. Did you notice how either of the two parts were made fast on the Wash Gray?

A. No.

Q. Did you notice how they were made fast on the Freeport Sulphur No. 1?

A. Yes.

Q. Was it made fast at a proper place and in a proper manner?

A. Yes.

Q. Could it have been done any better than it was done on the Freeport Sulphur No. 1?

A. Not so far as I know.

Q. Now, the tow lines were fastened on the bitts of the Wash Gray upon her head? That was the proper place to make them fast, wasn't it?

A. Yes.

Q. If there had been anything wrong in or about the fastening or securing of that tug before you started on your way you would have made them correct it before you would have taken it out?

A. Yes.

Q. You saw nothing wrong with her?

A. No.

Q. Was that tug a vessel built for navigation on the high seas, or was it an inland water boat?

A. I was never aboard the tug, I don't know anything about the tug.

Q. A vessel, for instance, that is built for sea navigation is but to meet greater force and strains,
481 are they not, than one built just simply for inland navigation?

A. Yes.

Q. So it is reasonable to suppose that a vessel constructed for gulf or seagoing navigation would stand more in the same weather, under the same conditions, than a vessel of the same size but built for inland navigation?

A. Yes.

Q. You started out with the tug in tow along in the evening, wasn't it of June 6th?

A. June 6th, yes.

Q. And towed that evening and all that night without any trouble?

A. Yes, sir.

Q. The boat was following along very nicely?

A. Very nicely.

Q. And seemed to be properly handled?

A. Yes.

Q. Then the next day, she followed along, she seemed in good order and condition, appearing to be properly handled?

A. Yes.

Q. Then the sea came up, didn't it, and the wind increased some?

A. The wind did not increase. It became squally. Began little rain squalls with puffs of wind.

Q. Captain, from the experience you have had—from your many years' experience at sea, isn't it a fact that in these puffs of wind—these squalls that come up—that you sometimes meet some of the highest wind velocity?

A. We do at times.

482 Q. In speaking of the condition of the sea, and making that entry in your log, I presume that you were making those entries and speaking of those conditions with respect—as they appeared to you and with regard to your vessel?

A. Yes.

Q. Not with regard to this little tug behind?

A. No.

Q. During your years of experience as a ship master, and in the service of ships in various other capacities—I suppose you have served in different capacities—have you seen and done much towing?

A. The last four years I have been doing considerable towing.

Q. Now, I ask you, then, Captain, in handling the Wash Gray, were you or your officers, or crew, in any way guilty of any negligence or anything of that sort causing the loss of that vessel?

A. No.

Mr. Kelley:

We object because the answer called for a conclusion which the witness is incompetent to give; that the conclusion is not based upon a knowledge of the facts, and calls for a mixed conclusion of law and fact, and is incompetent, immaterial and irrelevant.

Mr. Grace:

We submit that the gentleman on the stand has been qualified as an experienced seafaring man, of many

years' experience in towing vessels, and that on the Cross-Examination the question that we have propounded is in respect to those which have been asked on the Direct Examination, and concerning the issues
483 involved in this case, and is, we submit, admissible.

Q. Now, Captain, I understand that the movement of the Wash Gray through the water was at approximately nine miles an hour?

A. Yes.

Q. And that during the performance of this service, there was a strong current running with your ship and the tug?

A. Yes.

Q. Of approximately a mile and a half to two miles?

A. Yes.

Q. Which would account for the speed within the elapsed time of approximately eleven miles?

A. Approximately, according to the log (referring to the log), yes, 10.6 miles.

Q. Did you use any instrument to determine the velocity of the wind?

A. No, sir.

Q. During any time of the voyage?

A. No, sir.

Q. So, in speaking of what you consider the velocity, that is an estimated velocity?

A. Estimated, yes.

Q. Did you enter in your rough log or smooth log any note or memorandum of the velocity of the wind?

A. Yes, (referring to the log), the velocity is put down to 4 Beauford scale. That is estimated.

Mr. Dart:

What is that?

Q. The direction of that wind was what, Captain?

A. (Witness referring to log). Northeast-

484 erly.

Q. Out of the northeast?

A. Yes, northeasterly. It says northeasterly; that is also approximate.

Q. Varying either way?

A. Yes.

Q. The direction of the current was what? In other words, the drift of the current?

A. Offhand, (referring to log), about north by east, north 15 degrees east, approximately the drift of the current.

Q. The current would be running in that direction?

A. Yes, sir.

Q. So, that in a large measure the current was running against the effect of the wind?

A. To some extent.

Q. That produces a choppy sea?

A. At times, yes.

Q. And a choppy sea is hard on a small boat?

A. Yes.

Testimony adjourned at 1:00 p. m. for lunch and resumed at 2:25 p. m.

Q. Captain, taking the route that you usually follow in running from Tampico, Mexico, to Freeport, Texas, about what is the distance?

A. Four hundred and twenty-two miles.

485 Mr. Grace:

Reserving the benefit of the exceptions heretofore made with respect to the non-admissibility of the rough log produced, the following questions and the answers to them are had:

Q. Captain, it appears, does it not, by your log, that the Wash Gray sank in latitude 27.30 longitude 95.50?

A. Yes, that is the approximate position.

Q. Based upon the noon day observation?

A. Yes. You will understand that between the observation and the time that the ship sank, was pretty nearly twenty-four hours and half of that time the ship was lying to with the Wash Gray stopped and drifting, so that this position is very approximately twenty-four hours without observation.

Q. But at noon of that same day, June 8th, didn't you take an observation?

A. June 8th? I don't believe that the weather conditions allowed it. We sighted Matagorda stacks; that is the Gulf Sulphur Company.

Q. Yes, but that was 6:40 in the evening, wasn't it?

A. Six-forty in the evening, yes.

Q. But this position as estimated by you of the place where the Wash Gray sunk was estimated at 11:12 a. m.?

A. Yes.

Q. Then you say that the weather conditions at noon didn't permit of your taking an observation?

A. I can't remember, that is so long ago.

Q. The fact that no observation was taken
486 —what would you say? The fact that no observation appears entered, what would you say?

A. It appears here that we had an observation.

Q. What was it?

A. The observation was 27.31 and 95.51.

Q. 27.31 latitude and 95.51 longitude. Was that taken by observation or was it assumed?

A. That I can't say.

Q. Someone marked that down or was that simply dead reckoning?

A. I don't remember.

Q. Judging from the other entries here it would look as if that were from reckoning.

A. There is no difference. This is the assumed position at noon whether by observation or reckoning, I can't say.

Q. But, taking the position as given over on this other page, and taking the position from the last observation made, both of those were considered in fixing the position of the point where the Wash Gray sank as 27.30 latitude and 95.50 longitude?

A. Yes, that is the dead reckoning at noon, I presume. I don't remember but it seems to be.

Q. The position of the vessel given on the other page was not from observation?

A. From dead reckoning, I assume, but I don't remember.

Q. And your impression is that your reason for not having entered on that page where you would have entered an observation, was that the conditions of the weather would not permit of an observation being taken?

487

A. We usually don't make any remarks whether an observation can be taken or not, as our log books do not have any space for an observation taken or for dead reckoning. Some log books do but ours don't. We just give the position by dead reckoning and by observation.

Q. So that one can be checked against the other?

A. Yes.

Q. So, in fixing upon the place where the Wash Gray sank as 27.30 latitude and 95.50 longitude, you have done that with all the information before you at the time, both dead reckoning and observation?

A. No, that is a very approximate position because from the noon before and until the time the Wash Gray sank, we had no observation—that is nearly twenty-four hours.

Q. But you had your minutes—distance covered—measured by compass?

A. Yes, of course, but from the time that the ship was low down and until the time the tow boat sank, we were circling around and drifting and lying stopped all the time; 11:30 to 11:00 o'clock—nearly twelve hours, the ship was lying drifting, making no headway, making the position very approximate.

Q. Well, at all events, does that observation—the last one that you made prior to the sinking of the tug—and the position as given on the other page—does that indicate that there should be any correction in the latitude or longitude just given as where the Wash Gray sank?

488 A. The only way that can be ascertained would be to sail back from our position; the only way that could be done would be by sailing backwards.

Q. Will you kindly look at the next succeeding entries of observations so as to sail back and see that the position as given where the Wash Gray sank is very correct?

A. That is quite a big performance. In order to do that I would have to have sailing charts and courses and navigation books to see that the courses correspond. You say I shall follow up the courses and see if that position is correct?

Q. Have you any reason to believe that it is correct?

A. I am reasonably certain that it is fairly correct.

Q. Captain, if the condition of the weather were such as to prevent our making an observation to determine your latitude and longitude, what would those conditions be?

A. Well, the most usual condition preventing the taking of an observation is cloudy weather so as not to give a look at the sun.

Q. And such a cloudy condition that your instruments would be useless?

A. So that the disk of the sun is not visible.

Q. Now, it appears, does it not, by your log here, as of date June 7th, that at about 8:00 p. m. frequent showers came up and an increase of swell?

A. That is 8:00 p. m., yes.

Q. At that time it was dark, was it not, Captain?

A. Yes.

489 Q. And you could not tell at that time, could you, that seas were breaking over the head of the tug?

A. Not at 8:00 o'clock.

Q. So that no matter how hard they broke, or to what extent, you do not know?

A. No.

Q. And you are not prepared to say that they did not break over it?

A. No.

Q. Captain, what character of vessel was yours, that is, built of what material?

A. Steel ship.

Q. And of what material was the tug?

A. Wood.

Q. Where a wooden vessel rolls or pitches in the sea, what effect has that upon the caulking or seams?

A. It has a straining effect on a wooden ship and of course the seams will open.

Q. Do you know what quantity of oil was placed on board of the Wash Gray just before she left Tampico for fuel purposes?

A. No, sir.

Q. Do you know how long her tanks were, or what her capacity for carrying fuel oil, was?

A. No.

Q. Do you know how much boiler water or other fresh water was placed on board the Wash Gray
490 for her use before she left? Before she left Tampico?

A. No, sir.

Q. So that as a matter of fact, of your own personal knowledge, you do not know what water or what oil, or other facilities, were placed on board the tug Wash Gray to help her to make the trip from Tampico to Freeport?

A. No, sir.

Q. Is it not a fact, Captain, in your experience as a seafaring man, that you have known even iron vessels, where pitching and rolling in the sea, they have sheared their rivets and opened their seams?

A. Well, it has been my experience that a ship can spring her rivets—spring a leak.

Q. Did you notice about what freeboard the Wash Gray had, say, amidships, on leaving Tampico?

A. I could not say.

Q. Just roughly.

A. I think the most she could have had would be two and one-half feet, but that is only approximate. My attention was on other things.

Q. That would be amidships?

A. Yes.

Q. Her head, I suppose, extended up with a good sheer?

A. Yes.

Q. From your many years of experience on the sea, and in towing vessels, would you believe that,
491 under all the circumstances, so far as known to you, that you were justified in towing the Wash Gray as you did, and at the same speeds at which you towed her?

A. I believe from what I know about the boat that she should have been able to stand nine knots.

Q. Did you know as a matter of fact, that two marine surveyors, in the service of various underwriters' boards, had passed upon the sufficiency of the Wash Gray to make the trip from Tampico to Freeport?

A. It was not known to me at that time.

Q. You knew it since?

A. Yes.

Mr. Kelley:

We object and submit that the best way of proving that is by those who have learned it otherwise than by hearsay.

Q. As your vessel was coming on up on that trip about what freeboard did she have amidships?

A. She had four feet six inches as a minimum freeboard. On this particular trip I do not remember, as it is governed very often by the amount of water we have at Freeport.

Q. Could you tell by looking at your log and looking fore and aft, about what freeboard you had? Could you do that, Captain?

A. Yes. (Witness referring to log.) It would give us a freeboard of four feet six inches.

Q. How long was your vessel, the Freeport Sulphur No. 1?

A. 309 feet.

Q. What was her beam?

492 A. Forty-five feet.

Q. Do you know what the length of the Wash Gray was?

A. No.

Q. Would you say about one hundred feet?

A. Well, I have been told her length was—

Mr. Kelley:

We object on the ground that the witness states that he does not know and therefore any answer he might give to the question would be hearsay.

Q. Captain, do you recall having made with your first mate, Mr. Charles McCawley, an affidavit reading as follows:

Affidavit of C. G. Haslund and Charles McCawley omitted, being heretofore copied at page 52.

* * * * * * * *

493 which affidavit I show you for the purpose of refreshing your memory.

Mr. Kelley:

The Respondents object, first, on the ground that it is improper thus to refresh, or to attempt to refresh, the recollection of the witness by reference, not to an original document, made or signed by him, but what is obviously a copy, or a purported copy, of an original document. Second, on the ground that it is improper to thus place in the record an ex parte statement by another person, to-wit, Mr. McCawley, who purports to have signed this instrument in the same way; and, third,

on the ground that the document is self-serving and on the ground that any answer would be incompetent and immaterial. Further, that the statement made in the affidavit is mere statement of opinion upon a subject which is not properly the subject of opinion evidence.

Mr. Grace:

In reply to the objection, I will say that the copy used on this occasion is a copy made of a copy made by the Clerk of the United States District Court of that affidavit on file in the Court in this case, the one made by the United States District Clerk furnished Mr. Dart, was in turn by Mr. Dart loaned to us for copying the affidavit, and we hand the witness the copy made by the Clerk of the United States District Court.

(The document is handed to the witness.)

Q. Read it over, Captain.

A. I have read it over.

Q. Are the facts and things set out in this copy of the affidavit, which is on file in the United
494 States District Court, the original signed by you—are those facts true and correct?

A. Yes.

Q. Under the same conditions that confronted the officers and crew of the Tug Wash Gray at that time, in leaving the doors open for the purpose of getting out to save their lives if need be, would you have done the same thing that they did if placed in their position?

A. According to their statement of the conditions on the Tug, the entrance to the house, etc., I would say so.

Q. Captain, do you recall what the gross tonnage of the Freeport Sulphur No. 1, the vessel that did this towing, is?

A. Yes.

Q. What is it?

A. 2588.26 tons.

Q. And what is her displacement tonnage, do you know?

A. Her displacement is approximately three thousand tons.

Q. Do you recall, Captain, that the nationality of the Tug Wash Gray was Mexican?

A. I was told so, I never did notice her ensign, I didn't know anything about the Tug, but was told she was a Mexican vessel.

Q. So far as you know, Captain, did the owners of the Wash Gray in any way, or to any extent, neglect to do anything that they should have done for the safeguarding and proper towing of the Wash Gray?

A. So far as I know—they did not.

Q. And so far as you and your vessel are
495 concerned, and as a practical seaman, did you, or any of your men, neglect to observe, or take proper care or caution in the handling of the Tug Wash Gray?

A. No.

Mr. Kelley:

We renew to that question the same objection on a similar question, and on the same grounds move to strike it out.

Q. That is all.

Re-Direct Interrogatories.

Questions by Mr. Kelley:

Q. Captain, so far as your own knowledge is concerned, did the owners of the Wash Gray take any steps to safeguard the vessel or make her seaworthy of travel for this voyage?

A. So far as I know? I couldn't say about that. The Tug was brought out to me; I had orders to tow the ship to Freeport regardless of her seaworthiness. I had no instructions to examine the ship or any orders of that kind.

Q. You didn't examine the boat, never were aboard the tug, you didn't know anything about the seaworthiness of the Tug except as you could see from the bridge of your ship or from her deck?

A. That is correct.

Q. In answer to some question of Mr. Grace's, I think it may have been stated by you that you examined the towing bitts of the Tug. If you stated that—

496 Mr. Grace:

No, he didn't say that.

Q. You did not examine the towing bitts?

A. No.

Mr. Grace:

He examined them on his own ship.

Q. That was what I understood, but Mr. Dart—

Mr. Grace:

He said he did not as far as the Tug was concerned but the question was did he as far as his ship was concerned?

Q. To avoid any question about that—the crew of the Wash Gray made your hawser fast on their boat, didn't they?

A. Yes.

Q. On the Wash Gray?
A. Yes.
Q. And your own crew made the other end fast on the Freeport Sulphur No. 1?
A. Yes.
Q. That is all.

Mr. Grace:
And the place where the hawser was made fast on the ship was the proper place for making the tow line of the hawser fast, was it?

A. The only place it could be made fast.

Mr. Grace:
That is all.

497 And the said E. C. MARSHALL, after having first been duly sworn by W. D. Baggett, a Notary Public in and for Galveston County, Texas, testified as follows:

Direct Interrogatories.

Questions by Mr. Kelley:
Q. What are your initials, Mr. Marshall?
A. E. C. Marshall.
Q. Mr. Marshall, you are at the present time chief officer of the steamship Freeport Sulphur No. 1?
A. Yes.
Q. At the time when that vessel left Tampico in June of 1922, with the Tug Wash Gray in tow, were you an officer on her?
A. Yes.

Q. What were you? What position did you hold?

A. I was second officer.

Q. Do you remember about what time of the day you left Tampico?

A. Around six o'clock in the evening.

Q. And where did you pick up this Tug?

A. We picked up the Tug in the river.

Q. In the Panaco River?

A. The Panaco River.

Q. What did you tow her with, what kind of a hawser?

A. I think a manila hawser; eight inch manila hawser.

Q. How many parts?

A. It was one part.

Q. Just a single line?

A. One whole line, doubled; that would
498 mean two parts but not out.

Q. Do you remember about what the length of line was between your vessel and the Tug?

A. It was somewhere around three hundred or four hundred feet, if I remember right.

Q. You don't remember exactly?

A. I don't remember exactly.

Q. What was the character of the weather when you left Tampico?

A. It was good weather.

Q. You towed the vessel all of that night and all the following day?

A. Yes.

Q. Any signs of distress from her during that period?

A. No, sir, not that I know of.

Q. On that next day out of Tampico, that is, the first full day out of Tampico, what watch were you on?

A. Twelve to four.

Q. From midnight to four in the morning?

A. Yes.

Q. Were you on deck at the time the Tug made distress signals?

A. No, sir.

Q. When did you come on deck?

A. Twelve o'clock, midnight.

Q. Midnight. What was going on at that time when you came on deck?

A. Well, I don't remember exactly what it was, but I knew they had slowed the engines down and
499 I believe that they were getting ready to lower the lifeboat.

Q. Do you remember whether the Tug was still in tow?

A. The Tug wasn't in tow at that time.

Q. Had the hawser been disconnected in some way?

A. The hawser had been cut.

Q. At which end?

A. At the end made fast to the Tug.

Q. Was the lifeboat launched soon after you came on deck?

A. The lifeboat wasn't launched but was launched soon after I came on deck.

Q. What was the character of the weather at that time?

A. There was a small swell.

Q. Was it in general the same kind of weather you had when you left Tampico?

A. I don't believe it was the same; it was smooth weather when we left Tamipco, but a little more swell had developed that day.

Q. The Tug didn't sink until the following morning?

A. The following morning.

Q. Did you go aboard the Tug before she sank?

A. No, sir.

Q. Had you ever been aboard her from the time you took her in tow until she sank?

A. No, sir. I never had.

Q. You made no inspection of her at all except such as could be made from the bridge of your ship?

A. I didn't make any inspection.

Q. Except what you got looking out on the
500 deck of your ship?

A. That is all.

Q. Were you up when the Tug sank?

A. Yes.

Q. Did you see her sink?

A. Yes.

Q. How did she go down? By the head or by the stern?

A. By the stern.

Q. About what time of the day was it that the chief engineer went over and went aboard her?

A. It was after daylight in the morning, around five o'clock in the morning.

Q. How long did he stay aboard her, do you remember?

A. He was aboard, I guess, about three hours.

Q. How much swell was there during the daylight hours of that morning that she sank?

A. Well, there wasn't so much swell; there was some but wasn't very much; wasn't so much.

Q. Were the seas frequent, or was it one of these even long swells?

A. It wasn't a long swell; it was just a moderate swell; I don't know exactly how to explain it, it wasn't a large swell, or anything like that.

Q. What is your best estimate of the height of those swells from the crest of them down to the trough?

A. I should say about four feet.

Q. So, from the time you left Tampico up until the time the Tug sank, did the swell or the seas
501 get any higher than that, or was that about the highest sea you had?

Mr. Grace:

Objected to as leading and suggestive.

A. That was about the highest swell that I noticed.

Q. On the morning she sank?

A. Yes.

Q. What would you say was the highest velocity of the wind that you encountered from the time you left Tampico until the time the Tug sank?

A. Well, I should say about a twenty-five mile gale.

Q. Did you hear the cries or shouts of the Mexican crew at the time they waved their distress signals, or were you in your room?

A. I was in my room. I didn't come on deck.

Q. You didn't hear any of the disturbance? You didn't know anything about those fellows waving a red light or making some kind of distress signals prior to the time you came on deck?

A. No, sir.

Cross Interrogatories.

Questions by Mr. Grace:

Q. With respect to the length of the tow line between the Freeport Sulphur No. 1 and the Wash Gray, did that appear to you to be the usual length of tow line—whatever that length was—employed in towing vessels by the Freeport Sulphur No. 1?

A. Yes, sir, that is about the length.

Q. Previous to coming on watch—from twelve to eight that you speak of—when was your last
502 watch previous to that?

A. You mean twelve to four. In the morning when the distress signals were given?

Q. Yes.

A. My watch was twelve to four in the evening before.

Q. Your watch is regularly on that ship from what hour? Twelve to four in the day time and twelve to four in the night time?

A. Yes.

Q. So that you are off watch then from four o'clock until twelve midnight?

A. Yes.

Q. Who was the first officer at that time on that trip?

A. Charles McCawley.

Q. In so far as you know, within your personal knowledge, did the officers or crew of the Freeport Sulphur No. 1 in any way at any time do anything to jeopardize the safety of the Wash Gray?

Mr. Kelley:

We make the same objection heretofore made to a similar question. It is unnecessary to detail it. That is objected to on the ground previously stated.

A. No, sir.

Q. So far as you know, during the time that the Freeport Sulphur No. 1 was towing the Wash Gray, did they do everything that is usual and customary and that should be done with respect to the safety of the Tug, that they could do?

Mr. Kelley:

We make the same objection.

A. Yes, sir.

Q. And during the time that the Wash Gray was coming along behind the Freeport Sulhpur No. 503 1 in tow of her, while you were on watch and could observe her coming, was that vessel at all times well and properly handled behind you?

A. Yes, sir.

Q. That is all.

Re-Direct Interrogatories.

Questions by Mr. Kelley:

Q. Was the lifeboat of your vessel launched at any time during your watch for the purpose of sending it over to the Wash Gray?

A. Yes, sir, it was launched on my watch.

Q. How many times?

A. It was launched one time as I remember.

Q. And picked up men?

A. Yes, sir, picked up the crew the last time.

Q. Was any difficulty encountered either in launching it or picking it up?

A. No, sir.

Q. Was it launched again on your watch and before the Tug sank?

A. I don't remember whether it was launched again or not.

Q. Well, now, it was used for the purpose of bringing the Mexican crew off?

A. Yes.

Q. Was that during your watch?

A. Yes.

Q. It has also been stated that Mr. Fulford, the chief engineer, used it to go over to the Mexican tug.

Mr. Grace:

504 We object to the witness being advised as to what anyone has testified to, or otherwise, and submit that the question is leading and suggestive, and move that the question be stricken out.

Q. Was the Mexican crew taken off from the same launching of the lifeboat that the chief engineer used to go over to the Tug, or was it launched more than once?

A. If I remember all right, it was launched one time, and that was on my watch.

Q. You don't know whether it was launched again or not?

A. No, sir, I don't remember.

Q. Do you remember how many trips that lifeboat made back and forth between the Freeport Sulphur No. 1 and the Wash Gray?

A. I remember it made two trips that I remember.

Q. Now, what was done on those two trips as far as you observed?

A. One trip they investigated the Tug; asked the crew the condition of the Tug and reported back to the Captain what the crew had told them, and the next trip they took the crew off the Wash Gray and brought them over to the Freeport Sulphur No. 1.

Q. Those are the only trips you remember?

A. Those are the only two trips I remember.

Q. That is all, Mr. Grace.

Mr. Grace:

That is all.

505 And the said NELLO VIACAVA, after having first been duly sworn by W. D. Baggett, a Notary Public in and for Galveston County, Texas, testified as follows:

Direct Interrogatories.

Questions by Mr. Dart:

Q. Are you a member of the crew of the Freeport Sulphur No. 1?

A. Yes.

Q. What position do you hold?

A. First assistant engineer.

Q. How long have you been first assistant engineer?

A. Three years.

Q. Were you first assistant engineer on the trip from Tampico to Freeport when the Tug Wash Gray, which was being towed by the Freeport Sulphur No. 1 sank?

A. Yes, sir.

Q. What was your watch?

A. Four to eight.

Q. You mean by that four to eight a. m., and four to eight p. m.?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. Where were you when the—where were you about eleven-thirty p. m. on the night of June 7th when the Tug first began to sink?

A. I was asleep at that time. I was off duty.

Q. Did you get up at all during the night?

A. No, sir.

506 Q. When did you first learn that the Tug boat was in trouble?

A. The first thing in the morning—four o'clock.

Q. When you went on duty in the morning, what did you find?

A. The tugboat was in trouble so that they rang for the engine to stand by the tugboat and wait for the daylight so that they can go aboard to find out what the trouble was.

Q. What did your engine room telegraph show at the time you went on duty?

A. Slow speed; slow speed ahead; never did stop the engine, just slow speed all the time.

Mr. Grace:

We call for the production of the engine room log.

Q. Have you the engine room log?

A. It goes on the same as the Captain—one book like that.

Q. You say the engine room log is on board the ship for that voyage?

A. Yes, sir.

Q. You still have it on board the ship?

A. I am pretty sure. I can't say whether it is on the boat.

Q. You don't know whether it is on the boat or not?

A. No, sir. That is so long ago.

Q. Did you stay down in the engine room from four to eight?

A. I couldn't leave the engine room until my time off. I was not allowed to leave the engine room.

Q. Did you increase the speed of the boat from slow speed ahead at any time during that watch?

A. No, sir, I don't think so—I don't remember.

Mr. Grace:

Objected to as vague, uncertain and indefinite.

507 Q. Did you go on deck at eight o'clock?
A. Yes.
Q. Did you see the Tug boat then?
A. Yes.
Q. What did you see when you went on deck?
A. After breakfast I went on deck to find out what is wrong; the first thing had to call all the boys on deck—the Captain gave orders to get all men to help launch the boat in the water to go to the Tug boat.
Q. Did you get all the men on deck to put the lifeboat down?
A. Yes, sir.
Q. Did you help put the lifeboat in the water?
A. Yes, sir.
Q. Did you have any trouble in putting it down?
A. No, sir.
Q. Now, what was the purpose of putting the lifeboat down?
A. To go to the Tug boat to see what they could do to help or to see what is the trouble—to make it in condition to go on like we had before.
Q. How many men did you put in the lifeboat?
A. Let's see, the first mate, I remember that—chief engineer, two—three or four sailors, I don't know. No more than three sailors.
Q. Did they row the lifeboat over to the Tug boat?
A. Yes, sir.
Q. Did she ship any water?
A. No, sir, I don't think.

508 Mr. Grace:
Objected to as vague and indefinite.

Q. When you were launching the lifeboat in the water, did she swamp or fill up? Did the sea wash into the lifeboat?

A. I don't remember that; I don't think so; I don't know.

Q. If that had happened, would you remember?

Mr. Grace:

Objected to as manifestly calling for a conclusion of the witness as to what might or might not be.

Q. If the lifeboat had filled up with water you would have seen it, wouldn't you?

Mr. Grace:

Objected to.

A. I never did see any water go into the lifeboat.

Mr. Grace:

Objected to as leading and suggestive and we move that it be stricken out.

Q. How long did the lifeboat stay over by the Tug boat?

A. About two hours and a half.

Q. Then did they row back from the Tug boat to the steamship?

A. Yes, sir.

Q. Now, did you have anything to do with pumping any water from your boilers—from your tanks—into the boilers of the Tug boat?

A. The third assistant—he pumped. I helped to pass the hose to the boat.

Q. How did you go about putting the water from your ship into the Tug boat?

Mr. Grace:

This line of examination objected to. It does not appear that this witness was at any time on board
509 the Tug Boat.

A. We connected the hose on board our ship. We passed the line to the Tug Boat and then when they called ready for water, we pumped the water from our tanks to the Tug boat; then they started the fire. I saw smoke coming out from the stack.

Q. Stack of what?

A. Smokestack of the Tug—from the funnel, and they called enough water and we stopped the pumps.

Q. What hose pipe did you use?

A. Our canvas hose.

Q. And to what did you connect that on your ship?

A. To the pipe—inch and a half pipe.

Q. What pipe? Pipe leading to what?

A. The pipe leading to the tank. We had a line for washing the deck or any place. We connected the hose to a pipe and wash the deck and everything.

Q. Was that fresh or salt water?

A. Fresh water.

Q. To what tank did this pipe connect?

A. Fresh water tank, cook tank, any tank. We got the fresh water from the cook tank.

Q. Did you attend to pumping the water from that tank into the hose and over to the boat?

A. No, sir, I was on deck at the time.

Q. Do you know that it was done?

A. Yes, sir.

Q. You saw that done yourself?

510 A. Yes, sir.

Mr. Grace:

All this line of examination we call to the attention of the Court as being manifestly leading and suggestive, and we move that it be stricken out.

Mr. Dart:

We call the Court's attention to the fact that the witness does not understand English very well.

Mr. Grace:

We submit that if this be true the service of an interpreter may be secured, but this is not to be remedied by leading questions. All of which is submitted. And there is nothing to show that a question properly put cannot be answered as well as those in leading form.

Q. Now, Mr. Witness, what else was done in connection with the pumping of the water from your ship to the Tug boat?

A. I don't know. I don't know of anything else. We stayed there about two hours and a half and we saw we can't save the Tug.

Q. Where was the Tug boat during that operation?

A. She was tied upon a hawser with a short line about an eight inch line.

Q. What do you mean by a short line?

A. I mean by a short hawser.

Q. Is that the same hawser you towed her with?

A. Yes, that was the same hawser, eight inch.

Q. What do you mean by a short hawser?

A. So that they can reach her with a water hose. A short hawser so they can get the water to her.

Q. How close up did the Tug boat get to the steamship?

511 Mr. Grace:

The steamship to the Tug boat.

A. About two hundred yards.

Q. Were they two hundred yards apart when you were pumping water through the hose pipe?

A. About one hundred and fifty feet.

Q. What was this one hundred and fifty feet?

A. A hose. No water can be put through a rope.

Q. What was this one hundred and fifty feet?

A. Length of hosepipe. Length of water hose. Three lengths fifty feet in length.

Q. When I asked you a little before you said two hundred yards.

A. I said two hundred yards? Exactly I can't tell. I remember there were three sections of hose one hundred and fifty feet altogether.

Q. How long is each section of hose?

A. Fifty feet each.

Q. How close then, did the Tug boat get to the steamship or the steamship to the Tug boat, when you connected up the hose?

A. The same distance. We passed a heaving line to the lifeboat and then to the Tug boat.

Q. The heaving line?

A. Yes, sir.

Q. Is that a different line from the hawser?

A. Yes, sir.

Q. Did you put a heaving line on the Tug boat?

A. Yes, sir.

Q. How close did the bow of the Tug boat
512 get to the ship?

A. The closest the Tug boat got to the ship was one hundred and fifty feet.

Q. Did the bow of the Tug boat ever touch the side of the ship?

A. No, sir.

Q. When you ran the hose from the steamship to the Tug boat was the Tug boat lying astern of the steamship or abreast?

A. I don't know that. When they tied up the rope I wasn't on deck.

Q. But when they were pumping water?

A. The Tug boat was lying astern of the steamship

Q. Astern of the ship?

A. Yes, sir.

Q. Now, was this short hawser pulled taught or was it slack when you had the water pumped?

A. It was tight.

Q. Tight?

A. Yes, sir.

Q. And how long was that short hawser? What was the distance of it? Was it longer or shorter than the hose?

A. It was a little shorter than the hose.

Q. Shorter?

A. Yes, sir.

Q. How much shorter?

A. I don't know how much. It gives some.

Q. Was the water pumped before or after Mr. Fulford and the mate went aboard the life boat?

513 A. After they went on board.

Q. Was the chief, Mr. Fulford, and the mate on board the Tug boat when you pumped water through the hose?

A. Yes, sir.

Q. That is all.

Cross Interrogatories.

Questions by Mr. Grace:

Q. Have you seen a lifeboat launched in a heavy storm?

A. Yes, sir, I have seen them.

Q. Seen it often done?

A. Plenty of times, yes, sir.

Q. That is what they are carried on shipboard for?

A. When there is a storm a lifeboat is nothing on a ship.

Q. For the purpose of launching these lifeboats you have got regular davits at each end?

A. Yes, sir.

Q. So it will extend them outboard?

A. Yes, sir.

Q. During the evening of the day you left Tampico, you started off with the Wash Gray, everything was going nicely when you left Tampico, wasn't it?

A. Yes, sir.

Q. How many yards at that time was the Wash Gray towed behind the Freeport Sulphur No. 1?

A. About six hundred feet.

Q. That would be about two hundred yards
514 or six hundred feet?

A. Yes, sir.

Q. That is the usual length of a hawser used to tow Tug boats of that kind?

A. Yes, sir.

Q. You didn't go on board the Wash Gray at all yourself?

A. No, sir.

Q. I have heard you speak of a short hawser. That was because they shortened the hawser so as to pull the Wash Gray up to them? They maneuvered the Freeport Sulhpur No. 1 so that you got closer to the Wash Gray, and then shortened the hawser line so you could extend your hose?

A. Yes, sir.

Q. Now, this heaving line that you speak of, that is the line, hand line, that is thrown from one vessel to another so that when you got your heaving line over to the Wash Gray, they would have one part, and the other part on your vessel would be made fast to the hose so you could pull the hose over to the Tug?

A. That is correct.

Q. That is all.

Mr. Dart:

That is all.

Testimony concluded at 4:15 p. m., July 29, 1924.

516 RESPONDENTS' EXHIBIT No. 1.

Offered under agreement of parties shown at page 11 of this testimony.

Tuesday, 6th day of June, 1922.

2:30 Finished fumigation.

2:55 Finished loading cargo. Draft aft. 18.06 fowd. 16.06.

3:00 Doctor aboard and agent. Crew mustard out and all O. K.

3:15 Pilot H. Vongeis aboard. 3:28 tested out stearing gear found working O. K.

3:32 Stand by engines. 3:47 Let go oil docks Jones H. ahead.

4:40 Slow ahead.

4:45 Tug Wash Gray in tow.

5:41 Crossed Tampico Bar. 5:43 Slow speed. 5:44 Stop.

5:46 Pilot Vorgus off. 5:55 Hawser all fast. 6:00 departure. Towing Wash Gray from Tampico to Freeport.

4 to 8 Light E. breeze calm sea. Clear weather. Tug towing O. K.

8:10 Sighted Jersey Light. 8:25 Jersey Light on four points.

9:25 Jersey Light abeam 10½ miles off.

8 to 12 Light easterly breeze. Clear weather and smooth sea. Tug towing O. K.

Hrs.	Course P. Compass	Course H. Compass	Wind Bridge	Force	Bar.	Temp. Air-Sea	Soundings
1							
2							
3							
4	N. 36 E.	N. 18 E.	N. 20 E.	2	29-92	82—	Env. 30 E.
5							
6							
7							
8	N. 34° E.	N. 16° E.	N. 18° E.	2	29-96	83	
9							
10							
11							
12	N. 34° E.	N. 16° E.	N. 18° E.	2	30-00	87	

Latitude 25-18 N. Course N. 19 E. Distance 191 Miles Running time 18 hr.
Longitude 96-44 W. Distance .... by Log: No Log Average Speed 10.6 Knots.

1							
2							
3							
4	N. 34 E.	N. 16 E.	N. 18 E.	2	29-98	84—	
5							
6							
7							

8 N. 34 E. N. 16 E. N. 18 E. 2 29-99 82

		Bar.	Air
517	9		
	10		
11			
12		29-94	84

Remarks.

Chw. Slow 18'47"

From Tampico, Mex., to Freeport, Texas, Voy. No. 235. Wednesday 7th day of June, 1922.

12-4 Tug towing O. K.
Light easterly breeze partly cloudy smooth sea.

8 a. m. C/C to N. 16° E. Per Strd. Comp. Light S. E. Wind calm sea.
Clear weather Tug towing O. K.

10:00 Compand Compania O. K. Tug towing O. K.
Light easterly breeze—smooth sea—Partly cloudy weather.
Total Revolutions 81,560 Fuel consumed 130 bbls. Dist. by Wheel 191.
Revolutions per Min. 75.5 Fuel on Hand Cargo Slip% O.
Light East breeze partly cloudy and squaliy small swell.

8 p. m. Light E. wind small swell frequent showers.

11:30 Slow down engine crew on Tug "Wash Gray" waving red light.

11:45 Mexican crew on Tug cut hawser.

12:00 All hands on deck heaving in hawser. Steaming up alongside Tug Mexican crew demanded to be taken off as Tug was short of fuel and leaking badly.

1:45 Lowering Port lifeboat with chief officer and 5 men.

1	Course	P. H. Compass	Course Bridge Compass	Wind Force	Bar.	Air-Sea Soundings.
2						
3						
4						
5						
6						
7						
8					29.93	
9						
10						
11						
12	N. 34° E.		N. 16° E.	N. 18° E.	29-30	73

Latitude 27-31 N. Course Var. Distance 142 miles Running Time 24 hrs.
Longitude 95.51 W. Distance—By Log—Aver. Speed Var. Running slow 11 hr. 42 M.

1						
2						
3						
4	72 N.	34 E.	N. 16 E.	N. 18 E	4 29-94	80

518 Hrs.—Dis. Act. Log—Course P. H. Compass—Course. Bridge Compass—Wind Force—Bar.—Air-Sea—Soundings.

5						
6						
7.10		N 78	N 64°E			38

38	8	110	N 87°E	N 75°E	N 68 E	4	29-94	80	38
	9								
	10								
29	1	139							29
	12						29-94	78	67

Remarks.

From Tampico to Freeport, Voy. No. 235.
Thursday 8th day of June, 1922.

2:25 Boat returned to ship and reported no water and oil on the Tug and boilers killed and crew demanded to be taken off as Tug was leaking badly.
2:45 Lifeboat returned to ship with the Mexican crew of Tug Wash Gray. 6 men in all. Standing by until daylight.
5:15 As Tug did not appear to settle deeper. Lowered lifeboat and chief officer and chief engineer going on board Tug for examination.
6:00 Towing hawser made fast on Tug proceeded slow speed.
10:20 Unable to get up steam on Tug water gaining so fast that further work is useless.

Total Revolutions 75470—Fuel Consumed 108 bbls.—Dist. by wheel 153—Revolutions per Min. 52.3—Fuel on Hand Cargo—Slip % 7.2.

Lifeboat returned to ship and taken on board.

11:12 Tug Wash Gray sunk in Lat. 27° 30 Long. 95° 50 full ahead moderate N. E. breeze cloudy and squally weather. Choppy sea.
4:00 Streamed log reading 72.
6:40 Sighted Madagarda stacks 2 points on port bow.
7:20 C/C to N 64 E Per strd. comp. Madagarda abeam.

8:00 P. M. C/C to N 70 E per strd. comp. strong E. wind, squally weather with showers.
10:20 Sighted Brazos light 11:15 hauled in log—139. Light easterly breeze cloudy weather small swell.

Latitude, Freeport Course—Various Distance 89 miles —Running Time 12 H. 11 M.

Longitude, Freeport—Distance—Log—Average Speed 7.3 Knots.

Double bottom soundings:

No. 4	Starboard 4 in. oil and water	Port 6 in. water & oil.
No. 3	Dy.	Dy.
No. 2	Dy.	Dy.
No. 1	Dy.	Dy.

519 Remarks.

Chw. Slow 18-46.

From Tampico, Mexico to Freeport, Texas. Voy No. 235 9th day of June, 1922.

12:10 Stand by engine 12:11 H. ahead arrival Freeport Sea Buoy.
12:15 Stop. 12:18 Let go anchor 30 fathoms chain out.
12:20 R. O. engine.
12-4 Mod. N. E. breeze, cloudy and rain showers.
7:30 Hove up and moved out to deeper water. Large swell.
8:10 Let go anchor 6 fathoms of water.
8:13 R. O. E. 9:00 Pilot E. F. Smith aboard. Stand by.
9:12 Half ahead anchor up.
9:25 Struck the ground on bar. 12:00 run a line to Comstock.
12:55 Line parted from Comstock.

Total Revolutions 54080—Fuel consumed 115 bbls.—Dist. by wheel 126—Revolutions per min. 73-9—Fuel on Hand Cargo—Slip % 29-3.

1:00 Off ground full ahead to turn around at Sea Buoy.
1:35 Crossed bar Freeport. 2:35 R. O. engine made fast docks Freeport. Pilot E. F. Smith off. Draft 17-01 Aft 17-9.
2:10 Doctor and custom come aboard mustered crew.
3:20 Doctor and custom left ship.
4:00 Commenced discharging cargo.

320 DEPOSITIONS OF WILLIAM H. YOUNG AND CLYDE A. BARBOUR, BROKER, REGINALD L. BILLIN, T. CATESBY JONES, HARRY P. WINTERS, JOHN JOSEPH BARGHUSEN, EDWARD B. BANNISTER, CHARLES ROSEBROCK AND EXHIBITS, ATTACHED.

Filed May 31, 1926.

(Title Omitted.)

Depositions taken on behalf of the respondents at the office of Messrs. Bigham, Englar & Jones, 64 Wall Street, New York City, May 10th, 1926.

Appearances:

Messrs. Dart, Kernan & Dart.

Messrs. Bigham, Englar & Jones (Mr. Jones and Mr. Brengle) for respondents.

Messrs. John D. & M. A. Grace (Mr. John D. Grace) for the libelant.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable, copy to be served on opposing counsel.

WILLIAM H. YOUNG, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. Mr. Young, I believe that you have testified before in these cases by deposition?

A. Yes, sir.

Q. Has there been any change in your business or occupation since the date of your previous testimony?

A. None.

Q. You testified before I believe on behalf of the libelant, at least you were called by the libelant as a witness?

A. I believe so.

Q. If I recall your testimony aright, you
521 testified before that you had acted as broker on behalf of Compania de Navegacion Interior S. A. and Clyde A. Barbour, owners of the steamtug Wash Gray, in placing trip or voyage insurance on the tug for a voyage from Tampico to Texas?

A. Yes, sir.

Q. Was the insurance coverage provisionally bound or finally bound when you first went to see the various underwriters who issued policies on the tug?

A. It was finally bound in the first instance upon the information that we had in respect to the voyage to be made at that time. In other words, our applications were not marked "provisional".

Q. So that from the time your application was first accepted by the underwriters, the risk was finally bound, subject to later advices from you as to sailing dates and so on?

A. Yes.

Q. Do you recall the names of the individual underwriters who bound the risks on behalf of the companies that issued the policies on the Wash Gray?

A. May I answer that question at length?

Q. Yes, sir.

A. If you will look at my previous testimony that you have already referred to, you will find that this insurance was originally bound early in the year 1922, which insurance was subsequently canceled outright for the reason that the tow contemplated at that time was called off by Captain Barbour and later on it was reinstated with somewhat different conditions. Now in placing this insurance what we will call the second
522 time there was not the need of seeing the head men of the offices in connection with the so-called second placing for the reason that the conditions and everything surrounding the risk were practically the same, so that the men I saw who actually bound the risk at the time it came up in the second instance may have been different men from those who originally took the risk in the very first instance. Now I would like to ask you which men you want me to designate?

Q. Designate first by name the men whom you saw the very first time that the risk was bound at all, that is in February or March 1922?

Mr. Grace:

Objected to as being irrelevant and immaterial, incompetent and inadmissible.

A. I could do this better if I were permitted to refer to my records, if you want me to do it from memory I will do the best I can.

Mr. Grace:

No objection.

Q. You may refer to your records.

Mr. Grace:

May it be noted that this testimony is taken subject to the objection, without the necessity of repetition.

Mr. Brengle:

Yes, this entire line.

A. If I recall correctly the men who accepted this risk from me in the first instance were for the Fireman's Fund Mr. Buswell, for the L. L. & G.—

523 Q. Liverpool & London & Globe?

A. Yes—and National Liberty and Western Assurance, Mr. Winters of Carpinter & Baker. For the Hartford & Northwestern, Mr. Billin of the Vessel Agency. For the Aetna, Franklin and Springfield, Mr. Byrne of Talbot, Bird & Company. For the Globe & Rutgers Mr. Owens—George C. Owens. For the Phoenix Mr. John Barghusen. If I recall correctly, those are the men with whom I originally placed the risk.

Q. Do I understand you to testify that the coverage which was originally placed by you on the Wash Gray with these various marine insurance companies was later canceled and new coverage taken out?

A. Yes, sir.

Q. You don't understand then that what you have referred to as the second coverage was merely a change of some of the provisions of the prior coverage?

A. Technically it may not have been, but it amounted to practically that. The original insurance was canceled merely as a matter of convenience rather than have it stay open for some time when Captain Barbour's arrangements were not definite, we canceled it.

Q. Did you receive any new binders on this so called second insurance?

A. Entirely new binders.

Q. When did you place the so called second insurance coverage on the Wash Gray?

A. March 22nd, 1922.

Q. And at that time what individual underwriters did you talk with in binding the risk covered by the respondent insurance companies involved in this litigation—the same men that you had previously seen?

524 A. If I recall correctly they were the same men with the exception of one that I recall particularly, which was Mr. Rosebrock of Talbot, Bird & Company instead of Mr. Byrne.

Q. Do you recall whether you talked with Mr. Page of the Fireman's Fund Insurance Company in connection with this coverage?

A. I do.

Q. What did you say to him and what did he say to you, as you recall it?

A. The only conversation that I recall with Mr. Page was at the time the original insurance was placed. The surveyor warranty in our application was called to his attention by Mr. Buswell, it read something along the line that the vessel was warranted, surveyed and approved by Mr. Verne Dyer, Lloyd's agent at Tampico. Mr. Buswell asked Mr. Page if this gentleman was satisfactory to him to act in that capacity and he suggested that inasmuch as the United States Salvage Association was struggling to become a factor in this surveyor field that he was of a mind to assist them by appointing their representatives wherever possible, therefore he would prefer that in this instance Mr. Taylor of Tampico, the representative at that port of the United States Salvage Association, act in that capacity rather

than Mr. Dyer, to which I promptly agreed. That is all that I recall specifically talking with Mr. Page about.

Q. Do you recall whether Mr. Page bound
525 the risk on behalf of the Fireman's Fund Insurance Company?

A. To the best of my recollection he did not.

Q. Your recollection is the risk was bound by Mr. Buswell?

A. Yes, sir.

Q. Did you at any time in talking with the underwriters' representatives whom you have named or in binding the risk under the policies which were later issued on the Wash Gray, which policies are here in litigation—did you state or disclose to any of these gentlemen anything in regard to the terms of the contract under which the steamtug Wash Gray was to be towed from Mexico to Texas?

A. Nothing.

Q. You made no disclosure to the underwriters in regard to the terms of the towage contract at any time at all?

A. No, sir.

Q. Were you assisted by anyone in placing this insurance?

A. No.

Q. You placed it yourself?

A. Yes.

Q. Unaided?

A. Yes.

Cross Examination

By Mr. Grace:

Q. Mr. Young, how long have you been engaged in the business of placing insurance?

A. Since 1900.

Q. Your business is what?

A. Marine insurance brokers and agents.

Q. Been in that business since that period of time?

A. Yes, sir.

526 Q. With respect to placing insurance on vessels to be towed, have you done much of that work?

A. A very great deal.

Q. How does the amount of work that you had done with respect to placing insurance on vessels to be towed compare generally with that of others engaged in like business in the City of New York?

Mr. Brengle:

Objected to on the ground that the witness can have no personal knowledge of the amount of work done by other people, and as immaterial, irrelevant and incompetent.

A. I think if you compare our firms by size we do more than anybody else of similar size in our business, and I think we do more of that than any other concern with the possible exception of two.

Mr. Brengle:

I move that the answer be stricken out on the grounds stated in the objection.

Q. During all those years that you have mentioned while you have been carrying on the business of marine insurance broker here in the City of New York, have you at any time had occasion to submit or been called upon by underwriters to submit the contract for towage between the owners of the towing vessel and the vessel to be towed?

Mr. Brengle:

Objected to on the ground that it is immaterial, irrelevant and incompetent, calls for a conclusion, calls for testimony which has no bearing whatsoever
527 on any of the issues involved in this litigation and on further ground that it is improper cross examination in that it does not bear on any subject touched on in direct examination, and that counsel for the libelant is accordingly making the witness his own witness.

Mr. Grace:

We submit that they have directly touched upon the question as to whether or not the witness on the stand advised underwriters of the contents of the contract for the towage of the Wash Gray and under the line of examination we submit that we have a right to go into that question on not only whether he did it in this particular case but whether it was customary or usual to do it in any case.

A. No, sir.

Mr. Brengle:

In view of the statement of counsel for the libelant that he is endeavoring to prove whether or not certain acts are customary, further objection is made to this question and to the entire line of testimony that no custom has been pleaded, that any evidence of custom is immaterial, irrelevant and incompetent and highly improper.

Mr. Grace:

The purpose of this examination is to show that what the witness did in placing the insurance
528 which was placed with respect to the Wash Gray was in no way exceptional to the placing of

insurance as he has placed it during all his years of experience as broker engaged in marine insurance in the City of New York.

Q. Have you ever understood from other insurance brokers engaged in placing marine insurance or from underwriters that is was incumbent or proper or necessary for you to submit the towage contract?

Mr. Brengle:

Objected to as immaterial, irrelevant and incompetent, calling for a conclusion of the witness, calling for the witness' "understanding" and calling for testimony which is in no way binding on any of the respondents in this litigation, testimony which has no bearing or any issue involved in this litigation.

A. I have been advised and have understood that where towing contracts were submitted to me that were not the customary contracts in the trade that I should if I were advised of those contracts submit them to the underwriters for their consideration.

Mr. Brengle:

I move that the answer be stricken out on the grounds stated in the objection.

Q. You have seen the contract that existed between the owners of the Freeport Sulphur No. 1 that did the towing of the Wash Gray and the owners of the
529 Wash Gray that is concerned in this case?

Mr. Brengle:

Objected to as calling for a conclusion, immaterial, irrelevant and incompetent, and on the further ground that

it is not stated as to whether the witness saw the contract prior to the time he placed the insurance or afterward.

A. I have seen it.

Q. Was that contract the usual form of contract made for towing of vessels from Mexican ports to Texas ports?

Mr. Brengle:

Objected to on the ground that it is immaterial, irrelevant and incompetent, that it calls for a conclusion, that the witness has not been qualified as an expert in regard to towage contracts of the kind mentioned, that it calls for testimony that is in no way binding on the respondent and has no bearing on any issue involved in this litigation.

A. It is about the same as all similar contracts of that nature that I have seen.

Mr. Brengle:

I move that the answer be stricken out on the grounds stated in the objection.

Q. With respect to advice which you say was afforded you that where the contract between the owners of a towing vessel and the vessel to be towed is out of the ordinary form of contract customarily made in the particular trade—to what extent and from whom did you secure the advice that under those particular circumstances the contract should be exhibited to the underwriters?

530

Mr. Brengle:

Same objection.

A. I cannot recall the particular persons that ever gave me that advice. I have in times past spoken to attorneys about it and it is one of the things in our business which one learns in many years connection with our business, such as you learn what are the requirements of a broker in many other instances in connection with his placing of the risk and what his obligations are.

Q. In matters respecting obligations of insurance brokers and on questions of doubt in your mind respecting that, to whom do you ordinarily go to seek advice?

Mr. Brengle:
Same objection.

A. Our attorneys.

Q. Have you ever put that particular point up to your attorneys respecting your obligation?

Mr. Brengle:
Same objection.

A. I have.

Mr. Brengle:
And the further objection that the advice if any which the witness has received from his attorneys in other cases can have no bearing on any issue here involved, cannot be binding on any parties here involved and is
531 wholly in all ways immaterial, irrelevant and incompetent.

Q. What was the advice and by whom was that advice afforded you—speaking of the attorney?

Mr. Brengle:
Same objection.

A. When?

Q. At any time respecting the obligation of a broker concerning contracts that should be shown to the underwriters where they are not in terms which are usual and customary in the particular trade or trades?

Mr. Brengle:
Same objection.

A. Well, a case came up the latter part of last year like that which appeared to me to be one in which I wasn't quite sure whether the towing contract was one I should show to the underwriters or not. I took that contract to our attorney and asked for his advice on it.

Q. What was your attorney's advice on that?

Mr. Brengle:
Same objection.

A. In this case the towing contract looked to me to have things in it which were beyond the ordinary and I submitted it to our attorney asking him if he would give me his opinion after reading it if he thought there was anything in this contract which was beyond the ordinary and which would make it incumbent upon me or oblige me to show it to the underwriters. He read it and he then gave me quite a lengthy opinion which was
to the effect that under ordinary circumstances
532 it was not necessary for me to disclose to the
underwriters the towing contracts which were ordinary and customary to the trade and that it

wasn't one of the necessary requisites of a broker to disclose anything to the underwriters which were well known or well established by custom in connection with these towing risks or towing contracts, that in his opinion this particular contract which I showed him simply stated the same thing in different terms and in his opinion amounted to the same as the customary form of towing contracts, so he said he thought it would not be necessary for me to submit it to the underwriters but inasmuch as the surveyors to the United States Salvage Association in this particular case were called in and appointed by the United States Salvage Association, he suggested that I might also show this particular contract to Mr. Brengle of the United States Salvage Association and see what his opinion about it was and to come back and report to him, which I did do, and Mr. Brengle looked at this particular contract and confirmed the same view which was that it was merely a normal ordinary contract and that in his opinion it wasn't necessary for me to submit it to anybody.

Mr. Brengle:

I move that the answer be stricken out on all of the grounds stated in the various objections to this and similar questions and on the further ground that it is a recitation of hearsay, being a statement of what other persons told the witness, that it is a
533 recitation of the conclusions arrived at by these other persons on a state of facts not before the Court and not material to this litigation, and on the ground that it is not the best evidence of the conclusions and hearsay sought to be stated by the witness, that it is a conclusion of this witness on conclusions alleged to have been stated to him by other persons and is in other ways wholly immaterial, irrelevant and incompetent.

Q. Mr. Young, who was the attorney to whom you applied for that information and who afforded you the information you have mentioned?

Mr. Brengle:
Objected to on the same grounds heretofore stated.

A. Mr. D. Rogers Englar.
Q. A member of the firm of Bigham, Englar & Jones?
A. Yes, sir.
Q. You recall, Mr. Young, that in some of the policies it was stipulated that Mr. Taylor should make the inspection of the vessel and pass on the condition of the vessel and towing arrangements, and in some of the policies that Mr. Verne Dyer should pass on the seaworthiness of the vessel and towing arrangements, and I think in a few of the policies no mention was made one way or the other, do you recall that provision?

534 Mr. Brengle:
Objected to on the ground that the policies speak for themselves and are the best evidence of what is contained in them.

A. I recall that the insurance was placed with that provision and I believe it appears in the policies, I have not seen them for many years.
Q. Mr. Young, I show you attached to a copy of the depositions that are on file in the United States District Court—depositions taken in Mexico—copies of telegrams, the originals of which are attached to the depositions in the Court and I ask you if these telegrams were received by Messrs. Adams & Porter respecting that insurance on the Wash Gray?
A. Yes, sir.

Q. Who are Messrs. Adams & Porter?

A. They are my firm.

Q. That is your firm?

A. Yes, sir, they are also the owners or associates of the firm of William H. Young & Company, which firm is merged with Adams & Porter.

Q. When these telegrams that is from J. F. Taylor and from Verne Dyer were received here in New York, were the underwriters advised of their contents?

A. They were.

Q. In what way?

A. Copies were made of each telegram and attached to the original and the originals and copies were submitted to every underwriter, that is the originals and
535 copies of both telegrams were submitted to every underwriter identified with this risk. He initialed each telegram and kept a copy of each.

Q. That was prior to the execution of the policies of insurance?

A. It was, he then returned the originals to us by the way.

Q. In your 20 years of experience as an insurance broker in the City of New York and in the placing of marine insurance, has it ever been charged or contended in any case other than this of the Wash Gray that you have failed to make some representation or some showing or exhibition of some document to the underwriters effecting this insurance?

Mr. Brengle:

Objected to as immaterial, irrelevant and incompetent, calls for a conclusion, calls for testimony that has no bearing on any of the issues involved in this litigation, it is not binding on any of the parties hereto, and on

the further ground that it assumes that the witness is being criticised for not having done certain acts in this case, whereas no such criticism has been called to the attention of counsel for the respondents.

A. No, sir, not to my knowledge.

Q. Mr. Young, at the time that the insurance was effected on the Wash Gray, what was the rate of insurance on seagoing vessels making voyages from Mexican ports to Texas ports?

A. You mean annual or trip insurance?

536 Q. Both.

Mr. Brengle:

Objected to on the ground that it is wholly incompetent, immaterial and irrelevant.

A. On steel steamers is was around four percent annual insurance, on voyages about one-fifth—well say not over a quarter of one percent.

Mr. Brengle:

I move that the answer be stricken out on the grounds stated in the objection.

Q. And where the vessel is a seagoing vessel and towed from a Mexican port to say a Texas port on the Gulf, what was the rate per trip?

Mr. Brengle:

Same objection.

A. Ordinarily about one half of one percent.

Q. I notice in the policies written in this case that some of them charge as much as two and one-eighth

percent for this trip of the Wash Gray, can you state in a general way why that high rate of interest was required?

Mr. Brengle:
Objected to on the ground that it is immaterial, irrelevant and incompetent, calls for a conclusion of the witness, calls for the opinion of the witness on a topic in regard to which he has not been qualified as an expert.

A. Because it was a small inland vessel not accustomed to going outside on such long voyages as this.

537 Re-Direct Examination

By Mr. Brengle:

Mr. Brengle:
Without waiving the objection heretofore made that the examination of the witness has been improper on the ground that it calls for matters not covered in the direct examination, I should like to ask the following questions.

Q. You said, Mr. Young, that you have acted as broker in placing policies of insurance on both inland vessels and seagoing vessels between Tampico and United States Gulf ports?

A. I have placed such insurances, yes.

Q. You have testified as I understand that a higher rate of premium is charged for coverage on an inland vessel that is being so towed than on a seagoing vessel?

A. It depends on what you mean by an inland vessel, I testified that she was a small inland tug I think, I would not say that that rule applies generally.

Q. I will change my question then, you testified as I understand that the rate of premium for insurance coverage would be higher in the case of a small inland tug such as the Wash Gray than on an ocean going vessel, both of which were to be towed across the Gulf?

A. Yes.

Q. Isn't it the truth that a small inland tug like the Wash Gray would have to be towed with greater care across the Gulf than a larger ocean going vessel?

A. I think if they exercised the same amount of care in each instance they would be doing what was
538 right.

Mr. Brengle:

I move that the answer be stricken out as not responsive, I would like an answer directly to the question.

Q. (Repeated) Isn't it the truth that a small inland tug like the Wash Gray would have to be towed with greater care across the Gulf than a larger ocean going vessel?

Mr. Grace:

We object to the repetition of the question on the ground that the witness has already answered it in the statement that where the same degree of care is exercised in regard to both in his opinion that would be sufficient?

A. I suppose so, yes.

Mr. Grace:

We move that the answer be stricken out for the reasons first that the witness has not taken the stand

as a navigator or one actually engaged in the towing of water craft or operation of water craft, and that the answer is vague and indefinite.

By Mr. Jones:

Q. Mr. Young, did not you represent the Cluny Construction & Towing Company of Calcasieu Pass, Louisiana in 1912 in the matter of placing their insurance?

A. No, sir, not that I recall, when you say you—

Q. Either Adams & Porter or William H. Young & Company, you were connected with both of them at that time?

A. No, I was not connected with Adams & Porter at that time, I was purely William H. Young & Company in 1912.

539 Q. You had nothing to do with them?

A. Just as a correspondent.

Q. Don't you recall placing insurance for the Cluny Construction & Towing Company?

A. Meaning William H. Young?

Q. No, Adams & Porter.

A. No, I don't recollect.

Q. You have no recollection on the subject at all?

A. May I ask for amplification of that question.

Q. The question is didn't you acting for either William H. Young & Company or Adams & Porter act as broker for the Cluny Construction & Towing Company in the year 1912 in respect of placing a risk on certain barges to be towed from Louisiana ports to the frontier of Mexico?

A. The name escaped me at first, now that you mention the name I do recall the name very well and I recall that we may very well have either in my own capacity or in my capacity as William H. Young & Company correspondent of Adams & Porter we may have placed

some insurance for the Cluny Construction Company at that time because I remember the name quite well now that you ask me.

540 REGINALD L. BILLIN, being duly sworn and examined as a witness for the respondents testified as follows:

By Mr. Brengle:

Q. Mr. Billin, what is your present occupation?

A. I am assistant manager and underwriter of the Vessel Agency.

Q. How long have you held that position?

A. Well, I was underwriter in February 1922. I became assistant manager in 1924, January 1st.

Q. In 1922 what was the business of the Vessel Agency?

A. We write inland marine and coastwise, West Indies and fire insurance only on vessels.

Q. When you say inland coastwise, you mean inland and coastwise marine insurance?

A. Yes.

Q. On vessels?

A. Yes.

Q. Marine insurance?

A. Yes.

Q. How long have you been with the Vessel Agency?

A. February 1st 1922.

Q. How long have you been in the marine insurance business?

A. Since February 1st, 1915.

Q. During what part of that time have you been in the underwriting end of the marine insurance business?

A. I was in the marine insurance business from February 1st, 1915 to July 1st, 1918 with the Insurance Company of North America, Platt & Farnham of New York.

Q. You went from Platt & Farnham to the
541 Vessel Agency?

A. No, I went from there to Marsh & McLennan marine insurance brokers and adjusters.

Q. What were your duties with Marsh & McLennan?

A. I was their head hull placer.

Q. Will you explain what you did in that capacity?

A. I would receive orders in the office to insure some interest on a hull, and prepare my binders and go around the market and submit the risk to various underwriting offices and place the risk.

Q. Well, at Marsh & McLennan did you act in the capacity of agent for underwriters or broker for the assured?

A. Broker for the assured.

Q. Are you familiar with the usages and practices and customs of marine underwriters in the City of New York?

A. I think so.

Q. You are actually underwriting risks at the present time?

A. Yes, sir.

Q. When you say that you underwrite risks or are in the underwriting department, just what do you mean?

A. I mean that risks are submitted to me by brokers, I judge the risk and see if it is satisfactory in my estimation for the company to write, then I take a line if I think it is all right, I turn it down if I don't.

Q. In other words, you bind the risk for the company?

A. I bind the risk for the company.

542 Q. And issue insurance coverage on the risk submitted?

A. Yes.

Q. You have testified that in the year 1922 you were in the underwriting department of the Vessel Agency?

A. That is correct.

Q. What insurance companies did the Vessel Agency represent or act as agents for in the year 1922?

A. The Hartford Fire Insurance Company, Northwestern Fire Insurance Company, the Citizens Insurance Company, British General Insurance Company, Century Insurance Company, Atlas Insurance Company, the Merchants Insurance Company, and General Insurance Company.

Q. Now in your capacity as underwriter for the Vessel Agency in the year 1922, was it part of your duty to accept and bind risks for one or more of these companies that you have named?

A. It was.

Q. In the year 1922, the first part of 1922, was the Vessel Agency as agent for marine insurance companies which you have named, offered an insurance risk or risks on the steamtug Wash Gray?

A. Yes, sir.

Q. Was that risk offered to you as underwriter?

A. Yes, sir.

Q. By whom was it offered to you?

A. Mr. William H. Young.

Q. Do you know in what capacity Mr. Young was acting at that time?

A. Broker for the assured.

543 Q. Do you recall who the assured was—if you don't remember the name it was the owner of the Wash Gray?

A. Yes, Barbour I believe.

Q. It was a man named Barbour?

A. That is right.

Q. Will you state what Mr. Young said to you and what you either said to him or what you did in connection with this risk that was offered to you?

A. Mr. Young offered insurance on a trip on the Wash Gray in tow, the trip was to be subject to satisfactory inspection of the towing arrangements and the vessel and we had some discussion I believe on the rate and finally agreed to go on for a portion of the risk.

Q. Do you recall between what points the trip of the Wash Gray under tow was to be made?

A. Across the Gulf I believe from a Mexican port if I am not mistaken to a United States port—a Gulf port.

Q. I show you a paper and ask you what it is?

A. That is a binder—an insurance binder, a copy of the application for insurance.

Q. Was that paper ever submitted to you?

A. Yes, sir.

Q. By whom?

A. By Mr. Young.

Q. And are the initials RLB your initials?

A. Yes, sir.

Q. And your handwriting?

A. Yes, sir.

Mr. Brengle:

I offer that in evidence as Respondent's Exhibit 1 of this date.

544 It is so marked.

Mr. Grace:

Objected to as irrelevant, immaterial, incompetent and inadmissible.

Q. Mr. Billin, refreshing your recollection from this document which you have identified which has been offered as Exhibit 1, will you state again what the risk was that was offered you by Mr. Young?

A. The risk of hull insurance on the steamtug Wash Gray from Tampico to Galveston while in tow of the steamers Torres or Tapila, I don't know how else to describe it, covering hull insurance in accordance with inland vessel form of policy 850 deductible average.

Mr. Grace:

I submit that the policy itself is the best evidence of its terms.

Q. After this binder Exhibit 1 was initialed and executed by you, did Mr. Young or anybody else on behalf of the assured request that you on behalf of the companes that you represented change this insurance coverage in any particulars?

A. No, sir.

Q. Mr. Billin, I show you copies of two documents and ask you what they are, if you know?

A. These are the two policies which were issued to cover that binder, one being issued in the Hartford Fire Insurance Company for $4200, another policy being written in the Northwestern Fire & Marine Insurance Company for $2800, the two policies equalling the amount of the insurance $7000 on the binder.

545 Mr. Brengle:

I offer a copy of the Hartford Fire Insurance policy in evidence as Respondents Exhibit 2 of this date.

It is so marked.

Mr. Brengle:

I offer a copy of the Northwestern Fire & Marine Insurance Company's policy as Respondent's Exhibit 3 of this date.

It is so marked.

Mr. Grace:

Objected to on the ground that the originals are on file in this case, are at least in existence and have been used in the progress of this case and that the originals are the best evidence of the contract between the parties.

Mr. Brengle:

Counsel for the respondents call for the production at this time of the two original policies referred to.

Mr. Grace:

We submit that there was no advice contained in the notice to take this testimony that the policies would be required at this hearing.

Q. Mr Billin, I ask you to examine the rider annexed to each of these two policies and state after such examination whether there was not a change in the towage arrangements of the Wash Gray after the date on which you issued the binder which is in evidence as Respondent's Exhibit 1?

546 Mr. Grace:

Objected to on the ground that it is the nature of cross examination and further that the original is the best evidence of what the contents of the contract say.

A. There was.

Q. Will you state what that change was?
A. In regard to the towing vessels.
Q. What was the final—

Mr. Grace:
It is agreed that the objection made with respect to the use of the copies shall stand without necessity of repetition.

Mr. Brengle:
Yes.

Q. What was the final provision of the insurance coverage as to the vessel which was to tow the Wash Gray on this insured voyage?
A. The steamer Freeport Sulphur No. 1 was indorsed to be the towing vessel as far as Freeport, Texas, then the Wash Gray was to be towed by tug to Galveston.
Q. Do you recall whether you had any further conversation with Mr. Young or with anyone else on behalf of the assured in connection with that change which was made in the insurance coverage which you wrote?
A. No, sir.
Q. At the time you signed the binder Exhibit 1 of this date or at any other time before the policy was actually issued and delivered, did either Mr. Young or anyone else on behalf of the assured inform you as to the terms and conditions of the contract under
547 which the Wash Gray was to be towed from Mexico to this country?
A. No, sir.
Q. At any time prior to the execution and delivery of the two policies issued through the Vessel Agency did you know that the contract under which the Wash Gray was to be towed contained or was to contain the fol-

lowing clause: "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray".

Mr. Grace:

I object to this inquiry on the ground that it is immaterial, irrelevant, incompetent and inadmissible, seeking to adduce evidence that is not pertinent to a determination of the issue in this cause.

A. No, decidedly not.

Q. If you had known that the towage contract under which the Wash Gray was to be towed from Mexico to this country contained or was to contain a clause relieving or purporting to relieve the towing vessel from liability in connection with the tow, would you have bound the risk or issued the policies?

Mr. Grace:

We object to this inquiry respecting what the witness on the stand might have done three or four years ago if a certain statement had been made to him and further that the matter inquired about is immaterial, irrelevant, incompetent and inadmissable.

548 A. No.

Q. In your opinion, based on the experience which you have had as a marine underwriter and based on your knowledge of the uses, customs and practices of marine insurance business in New York, would a careful and prudent marine underwriter have written the policies which you stated your office wrote on the Wash Gray had such underwriter known or been advised that the towage was to be under a contract which relieved the towing vessel from liability for loss or damage to the towed vessel?

Mr. Grace:

Objected to on the ground that there is no proper foundation laid for this inquiry and that the nature of the inquiry is one that is immaterial, incompetent, irrelevant and inadmissable, has no bearing upon any issue involved in this cause.

A. My answer to that is no, I don't see how they could.

Q. Mr. Billin, based on the experience that you have had as a marine underwriter and on your knowledge of the customs, usages and practices in the marine insurance business in the city of New York is it your opinion that a clause in a towing contract which relieves or purports to relieve the towing vessel from liability for loss of or damage to the towed vessel is a fact material to the risk insured or sought to be insured under a policy of marine insurance on a towed vessel?

A. Decidedly, yes.

549 Mr. Grace:

Objected to as immaterial, irrelevant, incompetent and inadmissible, not pertinent to any issue involved in this cause.

By Mr. Jones:

Q. Mr. Billin, taking into consideration your experience in marine insurance business both as an underwriter and broker and your knowledge of the usages, practices and customs of marine underwriters in the City of New York, can you say whether or not a prudent and careful marine underwriter would have accepted a risk on the tug Wash Gray if he had known that the towing contract contained a provision reading as follows:

"Steamer Freeport Sulphur No. 1, the towing vessel, is not responsible in any way for loss or damage to the Wash Gray".

Mr. Grace:

I object to the question on the ground that there has been no foundation whatsoever laid for it, that the question does not relate to a matter pertinent to the determination of the issues in this cause, and on the still further ground that the question is immaterial, irrelevant and incompetent and inadmissible.

A. He would not.

Mr. Grace:

I move that the answer be stricken out on the grounds above stated.

By Mr. Brengle:

Q. Mr. Billin, approximately when did you first learn that the towage contract covering the
550 towing of the steamtug Wash Gray from Mexico to a Gulf port contained the clause: "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray"?

Mr. Grace:

Objected to as irrelevant, immaterial, incompetent and inadmissible.

A. Sometime after the loss occurred.

Mr. Grace:

The answer is objected to as vague and indefinite.

Q. Do you remember precisely when it was after the loss occurred that you first learned of this fact?

A. The precise date?

Q. The precise date.

A. No, sir.

Q. At any time prior to the date of the loss of the Wash Gray did you know of the existence of any alleged custom or practice under which all contracts for the towage of vessels across the Gulf of Mexico or from port to port in the Gulf of Mexico contained or were supposed to contain a clause relieving the towing vessel from liability for loss of or damage to the vessel?

Mr. Grace:

Objected to on the ground that this question does not seek to elicit information necessary for the determination of any issue involved in this cause, consequently that it is immaterial, irrelevant, incompetent and inadmissible.

551 A. I did not.

Mr. Grace:

I move that the answer be stricken out on the above grounds.

Q. In your experience as a marine underwriter have you ever had risks offered to you for coverage on vessels which were to be towed under a contract which you were advised contained or was to contain a clause relieving the towing vessel from liability?

Mr. Grace:

Objected to on the ground that the question is vague and indefinite, does not relate to any particular kind

or character of a vessel, does not relate to any particular point from which sailing or departure is made or to any point at which arrival is sought and I submit further that the question is immaterial, irrelevant, incompetent and inadmissible and I move that it be stricken out.

A. Yes.

Mr. Grace:
I move that the answer be stricken out also.

Q. Will you state one or more instances of such tender to you of risks of this kind?

Mr. Grace:
Same objection as made to the question just proceeding and move that this question be stricken out on those grounds.

A. I remember a barge being offered on a short trip where the insurance was placed subject to approved towing arrangements. It afterwards developed
552 that the assured wished to have the towing vessel released of any liability and the broker offered three times the original rate for that privilege.

Mr. Grace:
I move that the answer be stricken out on the ground previously stated and further that the response is vague and indefinite.

Q. Did you accept the risk on this vessel under those conditions?

Mr. Grace:
Same objection.

A. No, sir.

Cross Examination

By Mr. Grace:

Q. Will you kindly look at the binder and state what the amount of premium was that was charged for the insurance you placed in these two companies you have mentioned on the Wash Gray?

A. For the whole risk?

Q. Yes.

A. $140.

Q. The percentage?

A. Two percent.

Q. Was that the total premium?

A. Yes, on both policies.

Q. Doesn't your rider exact an additional payment of one quarter percent?

A. That is on the indorsement, not the binder.

Q. The insurance in the policy was originally fixed at two percent?

A. Yes.

Q. And on further indorsement of one-eighth of one percent exacted?

A. Yes.

553 Q. Making the total two and one-eighth percent?

A. That is correct.

Q. What are the initials on your binder back of the premium stamp?

A. You mean here?

Q. W. H. R. P.?

A. I don't know what it is, I didn't put it on.

Q. You don't know what it means?

A. No.

Q. That percentage that is charged there, the percentage charged in your policy two and one-eighth percent, isn't that the very highest?

A. Yes, it means warranted highest rate paid.

Q. Isn't that the very highest rate that was paid?

A. I suppose so, it was warranted that way.

Q. That was taking into consideration the fact that that was an inland boat that you were covering for a Gulf trip?

A. Yes.

Q. Where the contract for the towage of a vessel is in the usual and customary form is it necessary for the assured by himself or through his broker to submit that contract to the underwriters?

A. In a case like this, yes.

Q. I am speaking of where the contract is in the usual and customary form?

A. Not if it is the usual and customary form.

Q. Therefore whether it is usual or customary in this or any other case, if it is the usual and customary contract that is executed between parties, it is not necessary to submit it to the underwriters?

554 A. Not if it is usual and customary.

Q. That has been your experience for years and years in the insurance business?

A. Yes.

Re-Direct Examination.

By Mr. Brengle:

Q. Mr. Billin, referring to the letters W. H. R. P. on the binder which you have testified stand for the words "warranted highest rate paid," does that mean the highest rate paid on any risks written by your company or the highest rate paid by any other underwriters on the particular risk referred to in the binder?

A. It means warranted highest rate paid on this particular risk to any underwriter on this risk.

Q. In other words it means that no other underwriter on the particular risk which you are covering by that binder is to be paid a higher rate than the rate you get?

Mr. Grace:

Objected to as manifestly leading and suggestive and move that it be stricken from the record.

A. That is right.

Q. State whether or not the letters W. H. R. P. refer to rates on vessels being towed generally or refer to rates paid to other underwriters on this particular towage?

Mr. Grace:

Objected to, leading and suggestive and move that it be stricken out.

555 A. They pertain only to this risk, not to any other risk at all.

Re-Cross Examination.

By Mr. Grace:

Q. Do you know of any rate that was charged or a like service where any higher rate than that was charged other than is charged in this case?

A. Any other risk?

Q. Of a like nature?

A. Oh, yes.

Q. What risk have you in mind?

A. Well, there are risks offered every day, it is hard to tell any special risk, but I can remember a rate charged of seven percent.

Q. What were the circumstances?

A. Two barges in tow from a Gulf port over to Cuba.

Q. But this wasn't a barge, it was an inland tug?

A. That didn't make any difference.

Q. That is the reason I asked you of a like case—in other words, have you any recollection where any higher rate than two and one-eighth percent was charged for one trip on an inland tug from a Mexican to a Gulf port?

A. An inland tug in tow?

Q. Yes.

A. I can't remember any on an inland tug in tow, I know that on a number of risks the rate would be considerably higher than two percent, they vary a great deal.

Q. In other words you take into consideration the character of the vessel and the perils to which you anticipated she is exposed?

A. Yes.

Q. That is done in every instance?

556 A. Yes.

Q. In the case of the Wash Gray as well as other instances?

A. Yes.

Q. As a matter of fact, the underwriters have a record of the Wash Gray where they have easy access to it, haven't they?

A. I believe they have now.

Q. I mean had at the time this insurance was placed?

A. This insurance was placed subject to satisfactory inspection, we did not have inspection at that time but we had approval of the surveyor before we issued the policy.

Q. But first of all you had access to a record which would give you a description of this vessel, wouldn't it, I don't mean of its actual physical condition at the time the insurance was placed, but give you a general idea of the construction, power and equipment of the vessel?

A. I am not certain whether she was in any record that we had or not, usually when a risk is bound subject to satisfactory inspection, we simply wait until the inspection is satisfactory and then we have all particulars.

Q. That would cover even more than any description you might have in your records?

A. Yes.

Q. Because you have personal inspection by men of your choice?

A. That is right.

557 T. CATESBY JONES, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. Mr. Jones, what is your present occupation?

A. I am a lawyer.

Q. You are a member of the firm of Bigham, Englar & Jones?

A. I am.

Q. Attorneys for the respondents in these cases?

A. Yes.

Q. Were you a member of that firm in the summer and fall of 1922?

A. I don't remember whether the firm was Harrington, Bigham & Englar or Bigham, Englar & Jones at

that time but at any rate I was a member of the firm, no matter what the name was—yes it was Bigham, Englar & Jones at that time.

Q. Mr. Jones, in the summer or fall of the year of 1922 do you recall having had one or more conferences with Captain Clyde A. Barbour?

A. Yes.

Q. Where were those conferences held?

A. In my office, 64 Wall Street, New York.

Q. Did Captain Barbour come to see you alone or accompanied with someone else?

A. My recollection is on the first occasion he came to see me he came to see me alone and on the second occasion he came to see me accompanied by Mr. John D. Grace.

Mr. Grace calls attention of Mr. Jones to the fact that Mr. Grace never at any time called upon Mr. Jones in company with Captain Barbour.

558 A. (Continued) My recollection was that Mr. Grace was there.

Q. Your recollection is—

A. I do definitely recall that Captain Barbour was in my office and I had a talk with him about the Wash Gray.

Q. At these conferences what did Captain Barbour say to you and what did you say to him?

A. Well, I am stating only from memory—

Mr. Grace:

Objected to on the ground that if the purpose and object of Captain Barbour's visit was in an effort to reach an amicable adjustment of the case, that the issues might be understood by both sides and misunderstandings

brushed aside and the cause he amicably adjusted, that such conversations are of a privileged nature and are not admissible in evidence.

A. (Continued) Captain Barbour came to see me and stated that he wanted his loss paid, I stated to Captain Barbour that we were investigating the loss, Captain Barbour stated to me that there was no settlement of the case that he would consider under any circumstances other than a full payment, in other words he made it plain that he wasn't coming to see me to get a compromise settlement of his case. Captain Barbour stated to me that he did not see why we did not pay his loss and sue the towboat company or the steamship people for the loss, that the loss was due to the fact that they were towing the boat too fast, that is about all that I remember.

559 Q. Did Capain Barbour at either of these two conferences with you at your office offer to take less than 100 percent of his claim?

A. No, on the contrary he said he would not consider anything less than 100 percent of his claim.

Q. Do you recall whether Captain Barbour came to see you voluntarily of his own accord or was it at your request?

A. He came to see me of his own accord.

Q. I show you a letter addressed to you by Messrs. John D. & M. A. Grace and ask if you recall having seen that letter?

A. It is a letter addressed to me by Mr. John D. Grace dated November 7th, 1922, which I recall very distinctly as having received, my initials appear up in the corner as I made them in pencil shortly after I received the letter.

Q. Those initials are in your handwriting?

A. Oh, yes.

Mr. Brengle:
I offer the letter in evidence.

It is marked Respondent's Exhibit 4.

Q. Mr. Jones, do you recall whether the letter which you have just identified was received by you in answer or purported answer to a letter which you had written Mr. Grace?

A. Yes, the letter was written in reply to a letter which I wrote Mr. Grace.

Q. I show you what purports to be copy of a letter addressed to Mr. John D. Grace and ask if that is a copy of the letter which you sent to Mr. Grace?

A. Yes, this is a letter which I wrote Mr.
560 Grace and one to which I think the letter of November 7th is in reply.

Mr. Brengle:
I offer this carbon copy in evidence.

It is marked Respondents Exhibit 5.

Q. After your talk with Captain Clyde A. Barbour in which he suggested that the underwriters pay the loss in full and institute suit against the Freeport Sulphur No. 1 or its owners and stated that in his opinion the loss was due to the excessive rate at which the Wash Gray was towed, did Captain Barbour ever either orally or by letter to you withdraw that statement that the loss in his opinion was due to excessive rate of towage?

Mr. Grace:
Objected to on the grounds that the evidence taken in this case by the defendants themselves for the purpose

and object of attempting to show that the Wash Gray was towed too fast does on the contrary show that the rate of speed at which the Wash Gray was towed was not too fast for that vessel. Still further that at the time mentioned by Mr. Jones on the occasion of Captain Barbour's visit to him and at the date at which my letter was written, the testimony above referred to had not been taken. We submit that the facts as disclosed by the testimony of respondents' own witnesses being the real evidence in the case itself, not based upon conjectures but the opinion expressed by seafaring men
561 was that the speed of that vessel was a proper one in the opinion of the master of the Freeport Sulphur No. 1.

Mr. Brengle:

Counsel for respondents objects to the case being argued at this time.

Mr. Grace:

(Continuing) And that that testimony in itself obviated the necessity for any advice from Captain Barbour or for any further communication from counsel respecting the speed of the Wash Gray, libelant's counsel in the circumstances and Captain Barbour as an interested party being satisfied to let the issues stand on the testimony as adduced in this cause.

A. No, there was no withdrawal of his statement.

Cross Examination.

By Mr. Grace:

Q. Do you know, Mr. Jones, that Captain Barbour was not on board of the vessel at all during this towing operation—on either one of them?

A. He told me he wasn't on board.

Q. Of course you will concede that I was not on board either one of those vessels?

A. Oh, surely.

Q. Do you know whether or not—I will ask you to endeavor to refresh your memory on it—Captain Barbour called on you at the request and in the company of one of the underwriter's representatives—one of the underwriters defendants in this case—an officer or representative of one of the companies in this case and that it was he who accompanied Captain Barbour?

562 A. May I see my file. I have nothing here that refreshes my recollection on that point, I don't remember how Captain Barbour came, my impression is that he was sent by Mr. Young but I wouldn't swear to that because I don't remember.

Q. And whether it was instead of Mr. Young or myself, whether it was some high ranking officer of some one of the defendant companies, you don't recall?

A. I don't remember.

563 HARRY P. WINTERS, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. What is your present occupation?

A. Treasurer of Carpinter & Baker.

Q. How long have you been with Carpinter & Baker?

A. 48 years, I commenced January 10th, 1878.

Q. What is the business of Carpinter & Baker?

A. Insurance agents.

Q. For what companies do they act as agents?

A. At the present time we represent the United States Managers for the Connecticut Insurance Company of Hartford, the Fuso Marine & Fire of Japan. We

represent the inland marine department for the Liverpool & London & Globe, the inland department for the Union Marine Insurance Company of Liverpool, the inland department for the Boston Insurance Company, the inland department for the Old Colony Insurance Company, the inland department for the Fireman's Fund Insurance Company.

Q. In the year 1922 did Carpinter & Baker represent the inland department of the Liverpool, London & Globe?

A. Yes.

Q. During that year 1922 did your firm represent the Western Assurance Company?

A. Of Toronto, we did.

Q. And the National Liberty?

A. The National Liberty, we also represent the marine department for the National Liberty.

564 Q. You do now?

A. Yes.

Q. You did in 1922?

A. Yes.

Q. What position did you hold with Carpinter & Baker in the year 1922?

A. I held the same position I have now, and when risks to accept insurance on vessels or cargoes come in I generally look at the applications, pass upon them to take them or not.

Q. In other words you were in the underwriting end of the business at that time?

A. Yes.

Q. How long have you been underwriting marine insurance?

A. For the companies, for 25 years I guess.

Q. Were you in 1922 familiar with the customs, practices and usages of marine and inland marine insurance in the City of New York?

A. Yes.

Q. And had been for many years?

A. Yes, sir.

Q. In the year 1922 did any one offer to you a risk on the steam tug Wash Gray?

A. Yes, sir.

Q. Will you state who offered that risk to you, what was said and done at that time?

A. Mr. Young of William H. Young & Company came into the office with an application and wanted to know if we would take insurance on the tug Wash Gray on a trip from Tampico to Galveston.

By Mr. Grace:

Q. By way of Freeport?

565 A. Yes. I looked at the application, etc. and said leave it and we will look at it, we probably will be able to take a line, he said all right I will come back again, in the meantime I had a conference with Mr. Beebe who is president of the corporation and asked him and we came to the conclusion we would take it and we insured $10,000 in our office.

By Mr. Brengle:

Q. Do you recall how that $10,000 of coverage was divided—if it was divided—between the companies Carpinter & Baker represented?

A. I have not got it with me now, I know 40 some odd hundred dollars in the Western.

Q. You don't recall offhand how it was written?

A. Offhand $4300 in one company I think and $1600 in another.

Mr. Grace:

I have no objection to your suggesting the amounts.

A. (Continued): We had a certain percentage that we divided in the office among the companies, it was divided somewhat in that way. I have it in the office, I didn't think to bring it over.

Q. In which of the three companies was that $10,000 coverage divided among?

A. The Western Assurance Company, the Liverpool & London & Globe and the National Liberty Insurance Company.

Q. At the time that risk was placed with you or at any other time prior to the actual issue of the policies on the Wash Gray did either Mr. Young or anyone else on behalf of the owners of the Wash Gray
566 tell you that the Wash Gray was to be towed from Mexico to Freeport or Galveston under a contract which was to relieve or purport to relieve the towing vessel from liability for loss or damage to the tow?

Mr. Grace:

This naturally is objected to on the ground that it is irrelevant, immaterial, incompetent and inadmissible, seeking to adduce testimony not pertinent to the determination of any of the facts at issue in this cause.

A. No, sir.

Q. More specifically, did either Mr. Young or anyone else on behalf of the owners of the vessel at or prior to the time when the three policies were actually issued tell you that the towage contract under which the tug Wash Gray was to be towed contained or was to contain this clause: "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray."

Mr. Grace:
Objected to on the ground that the inquiry is immaterial, irrelevant and incompetent, inadmissible and I move to strike out the question.

A. No, sir.

Mr. Grace:
I move to strike out the answer.

Q. At any of those times did you know that the towage contract was to contain this clause or a similar clause?

567 Mr. Grace:
Same objection as above.

A. No, sir.

Mr. Grace:
I move to strike out the answer.

Q. Would you have bound the risk and issued the policies which were issued by Carpinter & Baker as agents of the three companies that you have named if you had known that the towage contract contained or was to contain the clause which I have read to you?

Mr. Grace:
Objected to on the ground that it seeks to adduce testimony respecting what this witness at this time says with regard to what his actions might have been something like four years ago and further that the inquiry is immaterial, irrelevant, incompetent and inadmissible with respect to any issue involved in this cause.

A. No, sir, we would not have issued the policy with that clause on.

Q. Would you have issued the policy if you had known that the towage contract was to contain that clause?

Mr. Grace:

Same objection.

A. No, we would not.

Q. Now Mr. Winters basing your answer on the experience which you have had as a marine and inland marine underwriter and on your knowledge and familiarity with the customs, usages and practices of the marine and inland marine insurance business, will you state whether or not in your opinion a clause in a towing contract relieving the towing vessel from liability for loss or damage to the towed vessel is a fact which is material to the risk insured or sought to be insured by a marine or inland marine policy covering the towed vessel?

568

Mr. Grace:

Objected to on the ground that the inquiry is immaterial, irrelevant, incompetent and inadmissible.

A. Why, it is one of the most objectionable clauses that could be put on a marine policy for the insurance company and we would not insure any vessel where the assured relieved the towing vessel of any liability.

Q. Now, so far as you know does the opinion which you have just expressed in that regard—is that opinion based on the general practice, usage and custom in the marine and inland marine insurance business in New York?

Mr. Grace:

Objected to as immaterial, irrelevant, incompetent and inadmissible.

A. I would think that most of the companies here would object to such a clause as that in their policies, there may be some companies would do it, but we wouldn't do it.

Q. The clause that I have been referring to namely the clause which relieved the towing vessel from liability for loss of or damage to the towed vessel was not in the policy but was in the contract of towage—that is the clause that you refer to?

A. That is the clause I refer to, yes.

569 Mr. Grace:

Objected to as leading and suggestive and move to strike it out.

Q. Mr. Winters, at any time up to the 8th day of June, 1922, that is the date on which the tug Wash Gray was lost, did you know of any custom or alleged custom under which all contracts or most contracts for the towage of vessels either across the Gulf of Mexico or from port to port in the Gulf of Mexico generally contained a clause relieving or purporting to relieve the towing vessel from liability for loss of or damage to the towed vessel.

Mr. Grace:

Objected to on the ground that the inquiry is irrelevant, immaterial, incompetent and inadmissible under any issue raised in this cause.

A. I never knew of any clause like that.

Q. I am asking about custom.

A. I don't know of any custom like that, never knew there was such a custom down there in the Gulf.

Q. Were you in the year 1922 and prior thereto in suring many risks in the Gulf of Mexico?

A. Why, we insured a few, not a great many but quite a number.

Q. Were the risks which you insured on vessels which were being towed as well as vessels which were proceeding under their own power?

A. Yes, sir, they were.

Cross Examination.

By Mr. Grace:

Q. Mr. Winters, what were those vessels that were insured in the Gulf that were being towed,
570 what vessels are you referring to?

A. That we insured?

Q. Yes.

A. I couldn't offhand say now but barges, tugs and steam vessels of different kinds, lots of towed vessels going up and down the Gulf.

Q. You cannot recall any instance?

A. I can't recall any particular one because there is so many of them lost, these oil barges that go along the coast that we insure right straight along.

Q. Oil barges of the Texas Company and Freeport Company?

A. Texas Company and Freeport Company.

Q. And Southern Pacific Company?

A. Southern Pacific Company—any barge that happens to go along the coast that we have an application and the risk seems acceptable, we insure it.

Q. Now Mr. Winters as a matter of fact the custom and practice of long standing in the insurance business

is, isn't it a fact that where a contract is drawn up between the owners of a ship and the owners of a tow it is drawn up under the terms and conditions that are customary and have prevailed very generally for quite a period of time in whatever trade it may be in, that it is not necessary to show such contract to the underwriters?

A. Absolutely it is necessary.

Q. All contracts?

A. Absolutely, it is one of the first clauses I think you will find in our inland marine policies that the assured must not do anything to affect the rights of subrogation against the offending vessel.

571 Q. Do I understand you to say that in all your practice that every time a tow is to be performed that you require the broker or owner of a vessel being towed to submit to your inspection and vise the contract that is to govern that towage services?

A. Not necessarily that because our policies expressly state that the assured must not waive any of the conditions of the policy to take away any rights of the insurance company.

Q. Whatever their rights may be?

A. Yes, therefore we would not ask on every single risk, that is naturally one of the things we insure against.

Q. It would be one of the most absurd things to require the owner of a vessel being towed to submit his contract right along where the contract is drawn up in the usual and customary practice of that trade?

A. It would be unusual where a man has a contract to tow a vessel to come into the insurance company and ask them to waive the conditions of subrogation against him.

Q. Have you ever heard of any usage or custom or practice in any trade over any waters in any part of

the world where the towing vessel is relieved from liability for any damage or loss occasioned to the tow?

A. I have heard of one.

Q. Where?

A. Only last year, of which we had 20 odd vessels insured, the owners came into us and wanted
572 us to relieve the towing vessel while in his tow—to relieve him of liability and we canceled our policies, would not allow it.

Q. What I am asking about is not what occurred in some particular instance but whether you know of any custom or usage or practice that actually prevailed in any waters in any part of the world where a towing vessel is to be relieved from liability or damage to the tow?

A. I don't know of any general practice at all, it is optional because they generally come in and ask for it.

Q. That particular tow you are speaking of where that request was made, was from where to where?

A. Running between New York and Buffalo on the canal.

Q. What kind of vessels were involved?

A. Barges being towed—practically steamers they carry cargo and tow vessels, the owners of these barges could not get a contract for that steamer to tow unless they would waive all subrogation against the steamer that tows them and we said gentlemen all right if you want that kind of contract we will cancel our policies and they canceled the policies.

Q. Is that the only instance you recall?

A. That is the only instance because that was a case of where the owners came in to ask us.

Q. With respect to those barges, do you know what the character of those barges were?

A. Yes.

Q. What were they?

573 A. Some steel barges and some wooden barges, they carried cargoes of grain and general merchandise.

Q. Did you see these barges yourself, personally?

A. No, sir.

Q. Have you any record of those barges in any report of any kind or character where you could determine what those barges were?

A. Yes, they are on the Custom House books.

Q. Certain that they are?

A. I am pretty certain.

Q. As a matter of fact do you know that they are on the Custom House books?

A. Yes.

Q. What are the names of the barges?

A. The William Lowry, the John J. Egan and the Hanley—three or four Hanley Brothers, I don't know the initials of all of them, any quantity of them, I could give you the names of the vessels by going to the office.

Q. Do you know whether they are open barges, deck barges or house barges?

A. Deck barges with hatches on.

Q. Carried their cargo in the hold or on deck?

A. In the hold, sealed.

Q. In entirely inland service?

A. Inland service, yes, sir.

Q. Those are the only instances you know of?

A. That is the only instance I recall at present, that is the only one because that is fresh in my mind, it is something that was unusual.

Adjourned for luncheon until 2 o'clock.

574 WILLIAM H. YOUNG, Recalled:

By Mr. Brengle:

Q. When you placed the risks on the Wash Gray with the various underwriters who issued policies on the vessel, did you disclose to any of the underwriters or tell any of the underwriters that the Wash Gray was to be towed at any particular rate of speed?

A. No, sir.

Mr. Grace:

Objected to on the ground that there is nothing contained in the record to show or indicate that the Wash Gray was to be towed at any particular rate of speed, furthermore that the testimony does show that the question of the rate of speed at which the Freeport Sulphur was to perform this contract was left entirely to the discretion of the master of the Freeport Sulphur No. 1 and to the master of the Wash Gray.

Q. Did you make any disclosure to the underwriters prior to the issuance of the policies on the Wash Gray that the vessel was to be towed by a steamship which sailed on a schedule which required a speed of from nine to ten miles or knots an hour?

Mr. Grace:

Objected to on the ground that the inquiry is directed along lines which does not involve any issue in this particular case, particularly because in the instance of that particular trip on which the Wash Gray was being towed there was to be no schedule observed in the towing thereof and that these facts were disclosed

575 by the testimony heretofore adduced by the respondents themselves.

A. No.

576 JOHN JOSEPH BARGHUSEN, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. Mr. Barghusen, what is your present occupation?

A. Marine underwriter, William H. McGee & Company.

Q. How long have you held that position?

A. About 10 years.

Q. During that time what classes or kinds of underwriting have you done?

A. Well, ocean and inland marine hull insurance, general inland transportation insurance, builder's risk insurance and what we call inland transit shipments by railroads, motor truck and all inland land vehicles as well as inland ocean, river and harbor craft.

Q. During the 10 years that you have been underwriting with William H. McGee & Company, Inc., have you personally accepted and bound risks as an underwriter with various companies?

A. I have.

Q. Will you name some of the companies for which William H. McGee & Company have acted as agent or general agent during the year 1922 and since that time and for which you have written policies as agents?

A. The St. Paul Fire & Marine Insurance Company, the Phoenix Insurance Company of Hartford, the Great American Insurance Company, the Westchester Fire Insurance Company, the Security Insurance Company of New Haven, the Providence-Washington Insurance Company, the Equitable Fire & Marine Insurance Company, Massachusetts Fire & Marine Insurance

577 Company, the American Alliance Insurance Company—is that enough, there may be one or two others I can't recall offhand.

Q. That is enough. Are you and were you in the year 1922 familiar with the general customs, usages and practices of the marine and inland marine insurance underwriting business in New York?

A. Generally yes, I would say so.

Q. During the year 1922 was an application made to you as an underwriter for William H. McGee & Company to issue one or more insurance policies on the steamtug Wash Gray?

A. Yes.

Q. Who was that application made by, if you remember?

A. Mr. Young of William H. Young & Company, 27 William Street.

Q. You understood at that time that Mr. Young was acting as broker for the assured?

A. I did.

Q. As a result of that application did you on behalf of the Phoenix Insurance Company of Hartford Connecticut issue a policy of insurance on the Wash Gray?

A. We did.

Q. Will you state if you can recall what that policy was to cover, that is was it a trip policy or a time policy and if a trip or voyage policy, what the voyage was?

A. The voyage was from Tampico to a Gulf port or ports, I don't recall which and was a voyage policy for a trip—speaking merely from recollection now.

Q. At the time you bound the risk covered by the policy issued by the Phoenix Insurance Company on the Wash Gray, at any time prior to the binding of

578 the risk or the issuance of the policy did Mr. Young or anyone else on behalf of the owners

of the steamtug Wash Gray tell you that the Wash Gray was to be towed under a contract which relieved the towing vessel from all liability for loss of or damage to the Wash Gray?

A. No.

Q. Specifically were you advised at any time prior to the issuance of the policy by either Mr. Young or anybody else on behalf of the owners of the Wash Gray that the towage contract was to contain this clause: "Steamship Freeport Sulphur No. 1 is not responsible in any way for loss or damage to the Wash Gray."

Mr. Grace:

Objected to as leading and suggestive and move that it be stricken out.

A. No.

Mr. Grace:

I move that the answer be stricken out.

Q. Would you have bound the risk or issued the policy which was issued on the Wash Gray if the fact had been disclosed to you that the towage contract was to contain a clause relieving or purporting to relieve the towing vessel from liability for loss or damage to the Wash Gray?

Mr. Grace:

I object, the question is inadmissible for the reason that the witness is asked at this time what he might have done some four years past under certain conditions. We object further for the reason that the inquiry is irrelevant, immaterial, incompetent and in-
579 admissible with respect to or in relation to any question really at issue in this cause.

A. Well, generally the probability is that we would not have bound the insurance or have issued the policy.

Mr. Grace:
I move that the answer be stricken from the record.

Q. At any time prior to the issuance and delivery of the policy of the Phoenix Insurance Company covering the Wash Gray on this trip, do you know of any alleged custom or general custom under which all contracts for towage across the Gulf of Mexico or from port to port in the Gulf of Mexico contained one or more clauses relieving or purporting to relieve the towing vessels from liability for loss or damage to the towed vessel?

Mr. Grace:
Objected to on the ground that the question is irrelevant, immaterial, incompetent and inadmissible.

A. No.

Mr. Grace:
I move that the answer be stricken from the record.

Q. Basing your answer on the experience which you have had during the past 10 or more years as a marine and inland marine underwriter and upon your knowledge of the general practices, customs and usages of the marine and inland marine insurance business, will you state whether or not a clause in a towing contract relieving or purporting to relieve the towing vessel from
589 liability for loss of or damage to the towed vessel is a fact material to the risk insured or sought to be insured in a policy of insurance on the towed vessel?

Mr. Grace:

Objected to as immaterial, irrelevant, incompetent and inadmissible.

A. We consider it a very material fact and one that deeply affects the subject matter insured because without liability on the part of the towing vessel it creates an attitude of indifference on the part of the tower and consequently renders the risk one a whole lot more hazardous to the underwriters.

Q. Again basing your answer on your knowledge of the marine insurance business and of the general usages, customs and practices of the marine and inland marine insurance business, will you state whether or not a prudent marine or inland marine underwriter would bind a risk or issue a policy on a towed vessel if he knew or if there were disclosed to him the fact that the towage contract was to contain a clause relieving the towing vessel from liability for loss or damage to the towed vessel?

Mr. Grace:

Objected to on the ground that it is immaterial, irrelevant, incompetent and inadmissible.

A. He might subject to the rates of limitations of cover that he would give on the vessel that was towed by a tower who was responsible or he might do it subject to an additional premium for the extra hazard involved paid as to the liability of the owner and the
581 fact that there is created an additional hazard by the reason of the non-liability of the tower.

Cross Examination.

By Mr. Grace:

Q. As a matter of fact, in your long years of experience in the insurance business, you know that it is true, do you not, that where the contract which exists between the tower and the owners of the vessel being towed is drawn up in the usual and customary terms or conditions which are usual and customary in the particular trade covered, that it is not necessary to show that contract to the underwriters?

A. It is necessary to make the underwriter familiar with any conditions in the towing contract at variance with what is customary and accepted by the underwriter.

Q. It may be that you have answered the question all right in a roundabout way, but so that there may be no room for misunderstanding between us, the fact is, is it not, that where the contract is a contract which is in terms usual and customary in the particular trade or service, then it is not necessary to show that contract to the underwriters, is it?

A. We don't see the towing contract—

Q. I would rather get an answer direct to the question and then make your explanation afterward.

A. We never see the towing contract in the marine business, we don't see the towing contract, we are made aware of any conditions in a towing contract
582 at variance with what is customary, so where the contract is a customary contract, usual to the trade I would say that we are presumed to know the contents of it.

Q. You know as a matter of fact, do you not, that there is in some different trades in different parts of the world where you may do business, a custom and usage that the towing vessel will not be responsible for loss or damage to the tow?

A. I can't say that I do.
Q. You never heard of it?
A. I never heard of it as a custom.
Q. Call it a general practice then?
A. No.
Q. Never heard of it even as a general practice?
A. No.
Q. In any part of the world?
A. No.
Q. Over any waters whatever?
A. No.
Q. Do you think that the mere fact that such a provision is contained in the contract, that it would make a tower indifferent and careless in the rendition of the service beyond what might ordinarily be expected of him?
A. Yes.
Q. Do you think that he would just willfully go ahead and do things that might be considered unquestionably endangering the property?
A. Yes.
Q. Do you think that he might even go ahead maliciously to tow the vessel under such circumstances that might bring about its destruction because of that condition in the contract?

583 Mr. Brengle:

I object to that as too remote, seeking to bring out the witness' opinion of what someone else might think or do under hypothetical circumstances which have no bearing on any issue involved in the present litigation, calling for testimony which is far beyond the scope of anything involved in this case.

A. This is the tower, is it not?
Q. Yes.

A. I don't know about the malicious part of it, but I do know this that a tower who is not responsible for the property being towed is placed in a position where he can render service for below normal service in the towing of a vessel and not be called upon to pay for any damage that is entailed by his disregard of the customary service that he should give.

Q. Do you mean that he might be guilty of gross negligence in the matter of towing service?

A. He might be.

Q. And you think if he was guilty of gross negligence in that service, absolute dirsegard of the rights of the owners of the property that he could not in any way be held responsible for damages resulting from such acts?

Mr. Brengle:

I object to that on the ground that it calls for the witness' opinion on a hypothetical legal question. The witness is not a lawyer, is not qualified to give a legal opinion on a matter of legal liability under the hypothetical circumstances recited in the question and it
584 is objected to on the further ground that it is immaterial, irrelevant and incompetent, deals with issues and assumed facts which are not involved in any way in the present case, calls for testimony that has no bearing on any of the issues herein, not binding on any of the parties hereto and is wholly immaterial, irrelevant and incompetent.

A. Is the question one dealing with his responsibility as to damages or is it a question as to whether we consider a towing vessel without responsibility capable of gross and wilful negligence?

Q. In other words in accepting a risk in any particular claim in any event irrespective of custom or

practice that may exist therein, you take into consideration the probabality that the parties undertaking the service will probably render an efficient one?

A. We expect the service rendered by the tower to be thoroughly competent and efficient.

Q. With respect to the tug Wash Gray, you knew her to be an inland water vessel at the time you bound the risk?

A. No.

Q. You didn't look into it at all?

A. I don't recall that we did.

Q. Then you really don't know at this time just what your information was at that time?

A. Not as to whether the vessel was a strictly inland water vessel and capable only of inland
585 water service or whether she was what you might term a semi-vessel capable of going inland to a certain extent and also capable of going to sea.

Q. You don't recall just what your information was?

A. Not exactly.

Q. It is quite a while back since that insurance was effected?

A. Approximately four years.

Q. In the meanwhile you have had of course considerable insurance business to transact?

A. Yes.

Q. The particular company for which insurance was written on the Wash Gray through your agency was what company?

A. The Phoenix Insurance Company of Hartford.

Q. Hartford, Connecticut?

A. Yes.

Q. Is that where their general offices are?

A. That is where the home office is.

Q. Where their officers such as president, secretary and treasurer are located?

A. Yes

Q. All their executive officers in other words are located there?

A. Yes, located in Hartford.

586 EDWARD B. BANNISTER, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. What is your present occupation?

A. Marine underwriter of the Globe & Rutgers Fire Insurance Company.

Q. How long have you been a marine underwriter for the Globe & Rutgers Fire Insurance Company?

A. About 11 years.

Q. Were you in the insurance business prior to that?

A. I was.

Q. Marine insurance business?

A. Marine insurance business.

Q. Where and in what capacity?

A. Chubb & Son as an adjuster, and various other departments down there.

Q. What has been your work during the past 10 or 11 years with the Globe & Rutgers Insurance Company?

A. Well, rating and accepting various risks of marine insurance for the Globe.

Mr. Grace:

The answer is objected to as being vague and indefinite.

Q. Will you explain a little more in detail what you mean by rating and accepting risks?

A. Well, the risks are submitted by various brokers for my approval and acceptance, it is up to me to either accept or decline the risk.

Q. In that connection do you fix the rate of premium at which you are willing to bind the risk which you accept?

A. The rates, terms and conditions.

587 Mr. Grace:

The answer is still objected to because the period of time covered by this particular service is not designated, respecting marine risks—hull risks.

Q. Are you and were you in the year 1922 familiar generally with the customs, usages and practices of the marine and inland marine insurance business in New York?

A. I was.

Mr. Grace:

The question is objected to because there are various classes of marine business, such as cargo insurance, hull insurance, etc.

Q. More specifically during the year 1922, were you familiar with the general customs, practices and usages of the marine insurance business in regard to the execution and issuance of binders and policies of insurance covering the hulls of ocean going and inland steam-tugs?

A. I was.

Mr. Grace:

Objected to on the ground that a proper foundation has not been laid for this inquiry indicating from what

source, in what manner and how. Unless such information is secured or knowledge secured we move to strike out the question and answer.

Q. It has been testified in these cases that the Globe & Rutgers Fire Insurance Company issued a policy of marnie or inland marine insurance on the steamtug Wash Gray for a voyage under tow across the Gulf of Mexico from Tampico Mexico to Freeport and or Galveston, Texas, the amount of that policy being
588 $23,000, do you know from your records or otherwise who bound the risk or issued the policy for the Globe & Rutgers Fire Insurance Company on that vessel?

A. Yes.

Mr. Grace:

Objected to on the ground that it is immaterial, irrelevant, incompetent and inadmissible for the witness to testify what information he may have secured from the records of the company or in the further vague assertion "or otherwise" and move that the answer be stricken from the record.

Q. It has been further testified in this proceeding by Mr. William H. Young that he as broker for the owners of the steamtug Wash Gray placed the risk with the Globe & Rutgers Fire Insurance Company, that the risk was bound on behalf of the Globe & Rutgers Fire Insurance Company by Mr. Owens, do you know from your records whether or not Mr. Owens bound the risk?

A. Mr. Owens bound the risk.

Q. Is Mr. Owens at the present time in the employ or service of the Globe & Rutgers Fire Insurance Company?

A. He is not.

Q. Do you know when he left the Globe & Rutgers Fire Insurance Company?

A. September 24, 1925.

Q. Do you know or are you informed as to where he is now?

A. I believe—in fact I know he is in Tokio, Japan.

Q. Mr. Bannister, basing your answer on your knowledge of the general practices, customs and usages of the marine and inland marine insurance business in New York with which you have testified you are
589 familiar, will you state whether or not in your opinion a prudent and careful marine or inland marine underwriter would bind a risk or issue a hull policy of insurance on a vessel which was to be towed across the Gulf of Mexico under a towage contract which provided that the towing vessel should not be responsible in any way for loss or damage of the towed vessel?

Mr. Grace:

Objected to on the ground that proper foundation has not been laid for the inquiry, further that it is irrelevant, incompetent, immaterial and inadmissible.

A. No.

Mr. Grace:

I move to strike the answer out.

Q. Was the general practice, custom and usage of marine and inland marine underwriters in that regard any different in 1922 from what it is at the present time?

Mr. Grace:

Objected to on the ground that proper foundation has not been laid for this inquiry.

A. No.

Q. Do you know or in the year 1922 did you know of any general custom or alleged custom under which all vessels which were being towed across the Gulf of Mexico or from port to port in the Gulf of Mexico should be towed under contracts which relieved the towing vessel from all responsibility for loss or damage to the towed vessel?

590 Mr. Grace:

Objected to on the ground that proper foundation has not been laid for the inquiry.

A. No.

Mr. Grace:

I move that the answer be stricken out.

Cross Examination.

By Mr. Grace:

Q. As an average adjuster of course you are not fixing rates or binding risks on hulls, are you?

A. Not as an average adjuster, no.

Q. How long have you actually been engaged in actually binding risks on hulls?

A. 11 years.

Q. Binding risks on hulls?

A. Binding risks on hulls.

Q. In other words where an application would be made for insurance at any time during the past 11 years,

your occupation has been one where you would fix the rate and sign the binder for marine insurance on hulls?

A. On hulls and cargo both.

Q. Hulls particularly?

A. Hulls particularly.

Q. During those 11 years?

A. During those 11 years.

Q. In saying that where the application would be presented to you that you would determine whether or not to accept the risk and if accepting it to fix the rate, do those things run through that whole 11 years, that kind of business?

A. 11 years.

Q. You had nothing whatever to do with the insurance that was effected on the Wash Gray?

A. No, sir.

Q. Either in binding or fixing the rate?

A. No, sir.

591 CHARLES ROSEBROCK, being duly sworn and examined as a witness for the respondents, testified as follows:

By Mr. Brengle:

Q. What is your present business or occupation?

A. Marine insurance.

Q. With what company are you associated?

A. Talbot, Bird & Company.

Q. How long have you been associated with Talbot, Bird & Company?

A. Since 1912.

Q. In what department of Talbot, Bird & Company are you working?

A. In the underwriting department.

Q. How long have you been in the underwriting department?

A. 1919.

Q. What marine insurance companies, if any, did Talbot, Bird represent as agents or general managers or otherwise in the year 1922?

A. The Aetna Insurance Company of Hartford, Franklin Fire Insurance Company and Springfield Fire & Marine Insurance Company.

Q. Did Talbot, Bird represent those three insurance companies generally, that is for all kinds of insurance or only for a particular kind of insurance?

A. For marine insurance only.

Q. My marine insurance do you mean simply ocean marine or do you include what is known as inland marine?

A. Inland marine too.

Q. I understood you to testify that since 1919 you have been in the underwriting department and
592 have been binding risks for those three companies?

A. I have.

Q. Were you familiar generally in the year 1922 with the general practices, customs and usages of the marine and inland marine insurance business in New York?

A. I was.

Q. Do you recall in the year 1922 having bound a risk on the steamtug Wash Gray for a voyage in tow from Tampico to a United States Gulf port on the application of Mr. William H. Young as broker for the owners of the vessel?

A. I do.

Q. Do you recall any details in regard to the risk which you bound on that application of Mr. Young's, that is do you recall in what companies the risk was bound and what the amounts were?

A. They were bound in the Aetna, Franklin and Springfield, the exact amounts I don't know.

Q. Do you recall whether policies were issued in due course on the risk so bound by you?

A. They were.

Q. At any time up to the actual date on which the policies of insurance on the Wash Gray were issued, had Mr. Young or anybody else on behalf of the owners of the Wash Gray notified you that the Wash Gray was to be towed from Mexico to this country under a towage contract which provided in effect that the towing vessel was not to be responsible in any way for loss or damage to the Wash Gray?

Mr. Grace:

Objected to on the ground that the inquiry is immaterial, irrelevant, incompetent and inadmissi-
593 ble as against any issue involved in this cause.

A. No.

Mr. Grace:

I move that the answer be stricken out.

Q. Would you have bound the risk and issued the policies at the premium rate at which you did if you had known or had been informed that the towage contract was to contain a clause relieving or purporting to relieve the towing vessel from responsibility in any way for loss or damage to the Wash Gray?

Mr. Grace:

Objected to on the ground that it calls for the opinion of the witness at this time as to what he might have done four years ago. We object further that the inquiry is immaterial, irrelevant, incompetent and inadmissible.

A. I would not.

Q. Basing your answer on your experience and knowledge as a marine underwriter and basing your answer also on your knowledge of the general practices, customs and usages of the marine and inland marine insurance business, will you state whether or not a clause in a towing contract relieving or purporting to relieve the towing vessel from responsibility for loss or damage to the towed vessel is a fact or circumstance material to the risk insured or sought to be insured under the policy covering the towed vessel?

594 Mr. Grace:

Objected to on the ground that the inquiry is directed along a line that is not pertinent to any issue raised in this particular case.

A. It does make a material difference, if there was a clause like that presented with an application we would take it under consideration and probably charge them a higher rate of premium for a trip of that character.

Q. In the year 1922 did you know of the existence or alleged existence of any custom or practice under which all contracts for towage either across the Gulf of Mexico or from port to port on the Gulf of of Mexico contained a clause or clauses relieving or purporting to relieve the towing vessel from responsibility for loss or damage to the towed vessel?

Mr. Grace:

Objected to on the ground that the question is irrelevant, immaterial, incompetent and inadmissible.

A. I did not.

Cross Examination.

By Mr. Grace:

Q. Do you know of a usage custom or practice resorted to in any port or any place on any waters the world over; wherever you may choose to locate it, where there is a custom or practice or usage for the towing vessel to be relieved from liability for or on account of loss or damage to the tow?

A. At present I do know, in 1922, I did not know there was a custom and usage to relieve the
595 towing vessel from liability in Gulf waters.

Q. You know that to be the fact now?

A. Now, but not in 1922.

Q. But you know now that it was the practice in 1922?

A. That I couldn't say.

Re-Direct Examination.

By Mr. Brengle:

Q. Mr. Rosebrock, on what did you base the statement that you just made that you now know that there is a custom or practice in the Gulf of Mexico that towing contracts shall contain a clause relieving the towing vessel from liability?

A. In the early part of 1925 we had a few risks going across the Gulf, the broker at that time advised us that it was the custom and usage of the Gulf to relieve the towing vessel from liability.

Q. Is that the sole basis of your knowledge at the present time?

A. It is.

Q. Who was the broker that told you that?

A. Mr. Young.

Q. William H. Young?

A. Yes.

Re-Cross Examination.

By Mr. Grace:

Q. You have known Mr. William H. Young, the gentleman you have just referred to, for how long a period of time?

A. I should say for about 12 years.

Q. Have you found him in his transactions as an insurance broker in particular and as a man
596 generally in whom you could place confidence upon his representations concerning custom and things of that sort in that business?

Mr. Brengle:

I object to that on the ground that it is immaterial, irrelevant and incompetent, that the qualifications or representations of Mr. Young are not at all at issue in the present case and have no bearing on any issue involved in the present litigation. I object further on the ground that the question calls for testimony which is not binding on any of the respondents in these cases.

A. Yes.

By Mr. Brengle:

Q. As far as you know, Mr. Young is not engaged in the business of towing on the Gulf?

A. He is not, so far as I know.

Q. As far as you know he never has been?

A. He has not.

Q. So that presumably any statements which he has made to you in regard to the customs and practice in the towing business on the Gulf are based on what somebody else has told him?

Mr. Grace:

Objected to as leading and suggestive and move that it be stricken out as manifestly improper.

Mr. Brengle:

I will withdraw the question.

597 By Mr. Grace:

Q. You have known Mr. Young to be placing insurance for the towage of vessels on the Gulf for how long a period of time?

A. Well, I know Mr. Young to be placing business for the last 12 years on all risks pertaining to marine insurance.

Q. Placing insurance on the Gulf as well as others?

A. The Atlanite Coast and Gulf.

598 RESPONDENT'S EXHIBIT 1,
OF 5/20/26 MG.

Insurance is wanted by Compania de Navegacion Interior S. A., and or Clyde A. Barbour.

For account of whom it may concern.

Loss, if any, payable to assured or order, as interest may appear.

On hull, tackle, apparel, machinery, etc.

Vessel Steam Tug "Wash Gray".

At and from Tampico to Galveston, in tow of Steamer "Torres" or "Topiloa" direct or indirect, and for 24 hours after arrival.

For $7000.

Rate 2% W. H. R. P. Premium $.....

Com. 15%.

Valued at $85,000.

Average $850.

Limit of Insurance $85,000.

Particulars, Inland vessel form $850 D/A. Vessel and towing arrangements subject to approval of surveyor of U. S. Salvage Ass'n. (Jas. F. Taylor.)

THE VESSEL AGENCY, INC.,
R. G. B.

Binding:

WM. H. YOUNG & CO.,
Applicant,

Binding:

.....
Attorney.

New York, March 22, 1922.
Wm. H. Young & Co.,
15 William Street,
New York.

599 EXHIBIT RESPONDENT NO. 4.

5/10/26 M. G.

Letter Head of John D. & M. A. Grace, Lawyers,

New Orleans, La., November 7, 1922.

Tug "Wash Gray",
Mr. T. Catesby Jones,
Bigham, Englar & Jones,
64 Wall Street,
New York, N. Y.

My dear Mr. Jones:

I have your letter in the above matter acknowledging receipt of copy of opinion sent by us to our clients in the above matter.

I note what you say about the position of Captain Barbour (who was in our office today) and myself respecting a possibility of recovering from the Freeport Sulphur Company, because of "negligence" of the tug in towing the "Wash Gray." Just there you have slightly misapprehended our position, as neither of us know of any negligence that company or its employees were actually guilty of. What we intended to have you understand was that the master is necessarily interested in showing that he was not guilty of negligence in the premises; for in that event both himself and his company stood liable to respond in damages for the loss of that vessel. We considered that if the Freeport Sulphur towed the "Wash Gray" at a speed of nine miles an hour during a period of time when it appears that a fresh wind was blowing, then, such a speed in such a wind with resultant sea would be negligence, for which ship and owners can be held.

We most positively contend that there was not any failure to disclose any fact the Underwriters were entitled to be advised of by the assured.

We will commence suits here, and are having made a spare copy of the libels for your convenience.

With kindest regards, I remain,

Yours very truly,

(Sgd.) JOHN D. GRACE.

JDG'c.

600 RESPONDENT'S EXHIBIT 5.

5/10/26 M. G.

Nov. 6, 1922.
(Time Stamp not Legible.)

November 2nd, 1922.

Tug "Wash Gray."

John D. Grace, Esq.,
12 Canal Bank Building,
New Orleans, La.

My dear Mr. Grace:

I thank you for your letter of October 26th, with which you sent me the very interesting opinion which you have prepared for your clients.

I fear that I have not made myself altogether clear. The position which I take is that there was no sea peril. So far as any of the reports which I have seen are concerned they indicate that the weather encountered was

ordinary weather encountered on the trip from Tampico to Galveston at the season of the year when the Wash Gray was lost.

There is another element of the case which has come to my attention since I talked with you, which is very serious. Both you and Captain Barbour suggested that there was a possibility of recovering from the Freeport Sulphur Company because of negligence of the tug in towing the "Wash Gray," the negligence specified by you and Captain Barbour being that the Freeport Sulphur No. 1, towed the "Wash Gray" too fast. Looking into this matter I have discovered that the contract made by Captain Barbour with the Freeport Sulphur Company released the Freeport Sulphur "No. 1" from all liability as a result of the towing. We have inquired of various underwriters whether they had any knowledge of this contract at the time that the policies were written, and they informed me that they knew nothing about it, and that, if they had known, they would not have written the insurance. To make sure that there could be no mistake on this score we also inquired of Mr. Taylor, the surveyor at Tampico as to whether he knew anything about the terms of the contract. Mr. Taylor has made an affidavit stating that he knew nothing about the terms of this contract. Consequently, it appears that there was failure to disclose a
601 material fact when the risk was written, and, on this ground alone underwriters feel that the claims should be declined.

I am sorry that I cannot conscientiously advise underwriters to pay the claim, and I am also sorry to note that there are some expressions in your opinion which seem to indicate that underwriters are declining to pay this claim without cause. The reasons for their not pay-

ing the claim seem to me to be ample, and, if suit results, we shall of course, defend the case on all grounds.

Very truly yours,

TJC-MHN.

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602 DEPOSITIONS OF JOHN H. JONES, THOS. C. THOMPSON, NEANDER CUNNINGHAM, L. A. SCOTT, LESLIE BODDEN, AND JOHN G. MURPHY, TAKEN BEFORE CLARENCE C. STRAIN, NOTARY PUBLIC, COUNTY OF MOBILE, MOBILE, ALABAMA, ON BEHALF OF RESPONDENTTS, SAID WITNESSES BEING FIRST DULY SWORN.

Filed May 31, 1926.

(Titles Omitted.)

It is stipulated and agreed by and between the parties to the above named causes, that the depositions of the witnesses produced before Clarence A. Strain, a Notary Public in and for the County of Mobile, State of Alabama, either by the Libelants or by the Respondents, shall be taken by the said Clarence A. Strain under the notice attached hereto, and when duly transcribed by him, shall be treated in all respects as if taken with all due formalities of law, singing, sealing, certification and return of the depositions to Court being waived.

603 It is further agreed that the original and one copy of depositions taken, as aforesaid, on behalf of the Libelants or the Respondents, shall be charged as costs.

Signed this the 20th day of May, 1926.

(Signed) JOHN D. GRACE,
Proctors for Libelants.
(Signed) HARRY T. SMITH &
CAFFEY,
Proctors for Respondents.

It is agreed between both of the above named that the Libelant's deposition or depositions at Mobile will be taken on Monday, May 24, 1926, before Mr. C. A. Strain, at the office of Harry T. Smith & Caffey, at 10 a. m.

(Signed) JOHN D. GRACE,

604 (Titles Omitted.)

Appearances:

Messrs. John D., M. A. and Edwin H. Grace, Attorneys at Law, New Orleans, La., appeared as Proctors of Record for the Libelants.

Messrs. Harry T. Smith & Caffey, (By Mr. Harry T. Smith), Attorneys at Law, Mobile, Ala., appeared as Proctors of Record for the Respondent.

The testimony of John H. Jones, Thomas C. Thompson, Neander Cunningham, L. A. Scott, Leslie Bodden and John G. Murphy, witnesses called by the Re-
605 spondent, and examined pursuant to the annexed notice, and agreement of Proctors of Record, before me, Clarence A. Strain, a Notary Public in and for the County of Mobile, State of Alabama, and

the Commissioner named in the aforesaid notice and agreement of Proctors, beginning at one o'clock P. M., April 20, 1926, at the offices of Harry T. Smith & Caffey, located on the 7th Floor, National City Bank Building, Mobile, Alabama; and the said witnesses, John H. Jones, Thomas C. Thompson, Neander Cunningham, L. A. Scott, Leslie Bodden and John G. Murphy, being by me first duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth in the said cause, hereinbefore stated, and now pending in the District Court of the United States for the Eastern District of Louisiana, did testify and say as follows:

606 JOHN H. JONES, a witness called on behalf of the Respondents, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. H. T. Smith:

Q. What is your name?

Ans. John H. Jones.

Q. Do you live in Mobile?

Ans. Yes, sir.

Q. What business are you engaged in?

Ans. Ship brokerage and steamship agency.

Q. With what concern?

Ans. Page & Jones.

Q. You are a member of the firm?

Ans. Yes, sir.

Q. How long have you been engaged in that line of business in Mobile?

Ans. I have been operating Page & Jones for about 23 years at Mobile.

Q. And in the course of that business, have you, or not, frequently had occasion to have vessels towed from one Gulf Port to the other?

Ans. Yes, sir.

Q. You are familiar with the way that business is conducted at Mobile, are you?

Ans. Yes, sir.

Q. And have been for many years?

Mr. Grace:

I object to the question as leading and suggestive.

Ans. Yes, sir.

Mr. Grace:

I move to exclude the answer upon the same ground.

Q. What is the custom in Mobile in regard to contracts for towage of vessels from one Gulf port to the other,—that is to say, how are such contracts
607 ordinarily made?

Mr. Grace:

I object to the question upon the ground that the proper foundation has not been laid.

Ans. The custom in contracting for towage of vessels or other craft from one port to another is by verbal agreement with the towboat companies. That is my custom and practice and has been ever since I have been in the business.

Q. In making those contracts, are there any special stipulations usually made or is it simply a question of what is to be done,—simply resting on the agreement with one to tow and the other to pay?

Ans. It is just an agreement of one to tow and the other to pay.

Q. How long have you been engaged in Mobile in business which required you to be familiar with that subject matter?

Ans. Prior to Page & Jones, I was with Louis Donald Company for about five years,—That will make a total of around 28 years.

Q. And during that time have you been familiar with the way that business has been conducted here in Mobile?

Ans. Yes, sir.

Q. Have you ever heard of any custom prevailing in that business to insert any particular stipulation in contracts of that kind?

Ans. Not on any of the business that I ever had.

Q. Have you heard of such custom?

Ans. Never have.

Q. About how frequently have you had occa-
608 sion to have vessels towed from one Gulf port to another?

Ans. Well, taking it on a yearly basis, we would have anywhere from half a dozen to a dozen of them within the year.

Q. Was, or not, all of that business done, or substantially all of the same, on a verbal contract?

Mr. Grace:

I object to the question as suggestive and move to strike it out.

Ans. All of it on the same basis,—just a verbal agreement with a certain party for a towage.

Q. Is that all of the stipulations that were in it?

Ans. Yes, sir.

Cross Examination.

By Mr. Grace:

Q. You are not, and have not been, engaged in the towboat business itself?

Ans. No, sir.

Q. You have had no vessels towed from American Gulf ports to Mexican Gulf ports, have you?

Ans. Directly I have not. Indirectly, we were instrumental as brokers in towing from Texas down to Tampico, Mexico.

Q. You have not been directly interested in the towing of any vessel from Mexican Gulf ports to American Gulf ports?

Ans. No, sir.

Q. Now, you spoke of a case where you were indirectly interested in the movement of a vessel from Texas—what place in Texas?

Ans. I think that may have been Galveston
609 or Beaumont. It was with the Direct Navigation Company.

Q. You do not know what port the vessel left from?

Ans. No; I do not.

Q. Do you know the name of the vessel?

Ans. It was a fleet of barges called D & 1 to D & 5.

Q. And that you say was the Direct Navigation Company?

Ans. Direct Navigation Company were the ones who did the towing.

Q. You were interested in that towage in what way?

Ans. We were the brokers in making the sale and making the delivery of the barges to Tampico.

Q. You do not know anything about who made the contract for the towage?

Ans. No, sir.

Q. You do not know whether the contract for the towage of those barges was in writing or not?

Ans. No, sir.

Q. You do not know what the conditions of that contract were?

Ans. No, sir.

Q. With respect to craft towed from one Gulf port to another,—American Gulf ports,—what kind of craft are you talking about?

Ans. Barges, schooners,—steamers.

Q. What steamer were you interested in having towed?

Ans. We were instrumental in the Steamer Lake Indian.

Q. Whom did she belong to?

Ans. She was purchased by Captain J. G. Murphy of Mobile.

Q. Where at?

Ans. She was bought from the Shipping Board at the time she was laid up around Orange, Texas.

Q. Who did the towing?

610 Ans. The Mobile Towing & Wrecking Company.

Q. Did you make the contract?

Ans. The contract was made in my presence.

Q. With whom?

Ans. The Mobile Towing & Wrecking Company with Captain Murphy.

Q. You did not make the contract itself?

Ans. No, sir; I was instrumental in the contract.

Q. Was the contract in writing?

Ans. No, sir.

Q. Are you certain of that?

Ans. Yes, sir.

Q. What was the condition of this steamer Lake Indian?

Ans. She had been in a laid up fleet and was purchased by Captain Murphy from the Shipping Board, and was to be towed to Mobile for dry docking and putting into condition.

Q. What do you mean by putting into condition,—put in a seaworthy condition?

Ans. In a seaworthy condition, and her engines and machinery overhauled.

Q. Now, you say, what concern did that towing?

Ans. The Mobile Towing & Wrecking Company.

Q. When was that?

Ans. The latter part of November, 1925.

Q. Is that the only steamship that you are concerned in with respect to the towing from one port to another?

Ans. That was the only steamer.

Q. And in respect to sailing vessels, what towing have you had done concerning sailing vessels?

Ans. Well, as regards the towing of sailing vessels,
I could not right now recall the names of the
611 vessels, but we oftentimes have vessels here at
Mobile, and going to load in other Gulf ports,—probably St. Andrews Bay or Pensacola or Mosspoint, and take up with the towboat company regarding towage.

Q. You can't recall the name of any one of them now?

Ans. If you want a specific case, I will name the Isabel C. Harris.

Q. Did you make the towing contract for her?

Ans. Yes, sir.

Q. With whom?

Ans. The Mobile Towing & Wrecking Company.

Q. Who is at the land of that concern?

Ans. Captain J. M. Walsh is President and Captain John A. Dorgan is Manager.

Q. When was it that that contract was made?

Ans. That was something over a year ago.

Q. Well, could you come a little nearer to it than that?

Ans. I would have to look on our books to see what vessels,—We charter a number of them, and I would have to see which ones were towed or shifted to other ports in loading.

Q. Well, you say this was over a year ago?

Ans. Yes, sir, over a year ago.

Q. Say along in the early part of 1925?

Ans. Early part of 1925.

Q. Can you give any other instances where you had anything to do with the contracts?

Ans. Not without referring you to my records in the office.

612 Q. With respect to this contract for the towing of the Schooner Isabel C. Harris, was that contract verbal or in writing?

Ans. Verbal.

Q. Can you give us any other instance of towage service that you have been directly interested in out of the port of Mobile or into the port of Mobile?

Ans. There were some barges which were towed, but I did not make the arrangement on the towage, but the arrangement was made in my presence, and the barges were delivered in Tampa, Florida.

Q. About when was that?

Ans. December and January, 1925 and 1926 respectively.

Q. Who did that towing?

Ans. Mobile Towing & Wrecking Co.

Q. Was it a written contract?

Ans. No, sir.

Q. Verbal?

Ans. Verbal.

Q. Did you have anything to do with the making of that contract?

Ans. No; I did not make the contract, but the contract was made in my presence by Captain Murphy who was the owner of the barges, and I had been the broker who effected the sale and assisted in arranging the transfer to Tampa.

Q. Do you know whether or not any one of these three contracts that you spoke of as verbal contracts were subsequently confirmed in writing?

Ans. They were not,—I know that.

Q. Certain of that?

Ans. Yes, sir.

Q. This Mobile Towing & Wrecking Com-
613 pany that you speak of,—is that a large concern or a small enterprise?

Ans. That is an old, established concern here at Mobile.

Q. How does it compare with your other concerns?

Ans. It is the best concern here. They are a substantial concern.

Q. Well with respect to their equipment, how does their equipment compare with the equipment of anyone else here?

Ans. I judge that they have the best equipment here.

Q. And with respect to the amount of business that these people do,—the Mobile Towing & Wrecking Company,—how does that compare with business done with other concerns.

Ans. They do the majority of the business.

Q. These are the only three instances that you can recall at this time?

Ans. Right at this time, the only three and my reasons for recalling same—but I understand I suppose you want something specific and definite.

Mr. Grace:
Yes.

Re-Direct Examination.

By Mr. Smith:
Q. During the whole course of your experience, have you ever heard it suggested prior to this examination that there was always an understanding that the towboat should not be liable for anything happening to the tow, no matter whether it was their fault or not?

Mr. Grace:
I object to the question as leading and suggestive, and move that it be stricken out.

614 Ans. No; I have never heard of any stipulation like that.

Mr. Grace:
I move that the answer be stricken out.

THOMAS C. THOMPSON, a witness called on behalf of the Respondents, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Smith:
Q. What is your full name?
Ans. Thomas Cunningham Thompson.

Q. Are you connected with or at the head of any concern doing business at Mobile?

Ans. I am the head of the Van Heynigan Brokerage Company.

Q. How long have you been at the head of the Van Heynigen Brokerage Company?

Ans. Since 1911.

Q. What business does that company conduct?

Ans. Ship brokers, ship agents, marine insurance and kindred branches.

Q. How long have you been in that business in Mobile,—whether with this concern or anybody else?

Ans. I have been with the Van Heynegan Brokerage Company since 1911. Prior to that with Shearer and Van Heynegan, which later became Van Heynegan & Company, and I should say probably for about 13 years prior to that.

615 Q. During all of this time have you personally been active in the business?

Ans. I have.

Q. Does the Van Heynegan Brokerage Company do any considerable business in your line or is it one of the small concerns here?

Ans. We do about the biggest business here. I would not like to say that we are the largest, but we are certainly not the smallest.

Q. In the course of the conduct of your business, do you or not have occasion to have vessels towed from—towing done in the Gulf from one Gulf port to another?

Ans. We have been instrumental in years gone by in those kind of things, but not in recent years. You are speaking of from one port to the other?

Q. I am talking about towage from one Gulf port to another,—from here or to here from other Gulf ports, or any port that required Gulf towage.

Ans. No; it has been a long time since we have had a case of that kind. There has not been any that I can recall within the last 15 years anyhow.

Q. Are you familiar with the business,—the way the business is done in Gulf towage in this port and how contracts are made and what the contract is?

Mr. Grace:

I object to the question on the ground that the witness very freely stated that they had had no business of that kind,—certainly not within the last 15 years.

Q. (Continuing): I am speaking now of the prevailing business and I am speaking of the general
616 practice in Mobile.

Mr. Grace:

The same objection.

Ans. No; I do not think we have had any of that kind of business.

Q. You have not had any towage from one Gulf port to another?

Ans. No, sir.

Q. Now, when you last had occasion to deal in that kind of towage, how were the contracts made?

Mr. Grace:

I object to the question on the ground that the proper foundation has not been laid.

Ans. Well, a simple understanding with the man. We act as brokers, and we make the best terms we can for the parties employing us, whether owners of the vessels or insurance companies, or whoever employed us.

Q. If I understand you, you have not had any Gulf towage done either on your own account or as brokers for sometime?

Ans. No, sir; I think I can say that we have never had any done for our own account, but we may have acted in the capacity of brokers.

Q. How were those contract made when you were familiar with them?

Ans. As I say, the contracts we made we would simply act as the go-between for the owner or other party getting prices for towing the vessel from Mobile to Pensacola for instance. It would be my duty to see the various towboat companies, and get prices from all of them and submit them. That is, if there was more than one, and get the least price I could for my client.

Q. When the towboat was employed, in the
617 contract of employment, what was the contract?

Mr. Grace:

I object to the question on the ground that the question put to the witness goes back for a period of years around 15, at least, and that the witness has not said, and does not pretend to say, that he can recall at this time what terms and conditions were that were contained in the contract made so many years ago.

Ans. The contracts,—so far as that is concerned, we simply went out and got these prices, and we would submit them to the owners and the owners would instruct us how to act.

Q. Would the contracts be in writing or verbal?

Ans. They were probably all verbal.

Mr. Grace:

I move to strike out the answer as being vague and indefinite.

Q. During your experience, have you ever, prior to this examination here, heard of anyone claiming that it was the general custom that all towing should be done with an understanding that the tug should not be liable no matter what it did?

Mr. Grace:

I object to the question on the ground that it is manifestly leading and suggestive, secondly, the proper foundation has not been laid, and I move to strike the question from the record.

(The question was not answered.)

Q. Is this the first time that you have ever heard of that situation?

Mr. Grace:

The same objection.

Ans. Yes; I would say it is.

618 Cross Examination.

By Mr. Grace:

Q. In those instances where you or your firm, in times past have participated in the matter of securing engagements for towage services,—do you know whether, or not, those agreements were afterwards confirmed in writing?

Ans. I cannot answer that. I do not know.

NEANDER CUNNINGHAM, a witness called on behalf of the Respondents, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Smith:

Q. What is your business or occupation?

Ans. Secretary and Treasurer of Van Heynegan Brokerage Company.

Q. How long has that been your business?

A. About 12 years.

Q. Now, during that time have you or not been familiar with the way in which that business has been conducted in Mobile?

Mr. Grace:

I object to the question because the proper foundation has not been laid, and secondly, because the question is vague and indefinite, and I move that it be stricken out.

Ans. Yes, sir.

Q. Will you explain to us,—you are ship brokers?

Ans. Yes, sir.

Q. What do you do; what does that consist of?

Ans. Well, we arrange charters. We ar-
619 range dock space; we handle steamers; we assemble cargo. We do practically everything that an owner would do for his own vessel, while she is in port consigned to us.

Q. Now does your work in that line allow you to familiarize yourself with all of the contracts for that line of business in Mobile?

Ans. It does.

Q. What is the method that is ordinarily pursued in Mobile when an owner either of a vessel or of barges desires to have the vessel towed from one Gulf port to the other,—what is actually done?

Mr. Grace:

I object to the question because the proper foundation has not been laid.

Ans. In cases of that kind, the only thing we do, is that we would call up the towboat companies in Mobile and sometimes in other ports, if we think the price is not right, and ask what prices they would charge for towing the vessel from Mobile to another Gulf port.

Q. Are those contracts ordinarily in writing or verbal?

Ans. Verbal.

Q. Is there ordinarily any special stipulations outside of what the prices will be, or not?

Ans. The only stipulations that I remember is whether the vessel would be towed from dock to dock, or from pier to pier.

Q. During your whole experience as a ship broker, prior to the time I called on you and asked you what the practice was in this port,—had you ever
620 heard of a custom that it would be stipulated between the towboat company or the towing company and the owner of the vessel towed, that the towboat, or towing concern, should not be responsible for damage that it did by its wrong or fault?

Mr. Grace:

I object to the question on the grounds that there is nothing in the evidence to show that the witness on the stand has ever made or entered into a contract for him-

self or his firm or company and client, that he personally has ever made for the towage of any vessel from one port to another port; secondly, that there has been no foundation made for the answer.

Ans. No; not in my line. That has never come up when I have arranged contracts for towing.

Q. When was the first time you ever heard it suggested that there was such a custom?

Ans. I never heard it suggested there was such a custom before you mentioned it to me the other day and asked if I had heard of it. That was the first time I believe I had ever heard that brought up in our business.

Cross Examination.

By Mr. Grace:

Q. Have you personally ever made a contract with any towing concern for the towing of any vessel out of Mobile to a Gulf port in Mexico?

Ans. Out of Mobile to a Gulf port?

Q. In Mexico?

Ans. Yes, sir; I think so, but I cannot call the names of the vessels now.

Q. You can't recall the names of the particu-
621 lar vessels that were towed?

Ans. No, sir.

Q. Or you can't recall the name of the towboat company?

Ans. The Mobile Towing & Wrecking Company.

Q. Do you know when that was done?

Ans. No; we have done it on numerous occasions for different masters that would come up to the office and wanted to load part cargo in Mobile and part cargo, I will say, in St. Andrews Bay, and he has got us to call

up and ask the various towboat concerns what the charges would be, and when we got the charges he would tell us all right, just tell him to tow her.

Q. Coming back to this particular case, with respect to a towage in which a Mexican Gulf port was concerned.—when did that particular case occur?

Ans. I do not remember.

Q. You do not remember about how many years back?

Ans. I should say four or five years back. It may be less; it may be more.

Q. What kind of a vessel was it?

Ans. A sailing vessel.

Q. And towed from where to where?

Ans. I think this particular case was from Mobile to St. Andrews Bay, but may have been from Mobile to Gulfport.

Q. Now, I am asking you particularly with regard to a port in Mexico, not with regard to an American Gulf port?

622 Ans. We have never had a contract for towage from Mobile to any port in Mexico.

Q. Then the case you speak of occurring some four or five years ago, was not for a Mexican port?

Ans. No; it was for a Gulf of Mexico port.

Q. Have you ever made yourself, personally, any contracts for towing any vessel wherein a vessel was to be towed from a port in Mexico to an American port on the Gulf?

Ans. No, sir.

Q. Have you personally made and entered into a contract with anyone for the towage of any particular vessel,—you personally,—not as brokers,—but you personally making it?

Ans. No; personally I have not.

Q. Have you, as Secretary and Treasurer of the Van Heynegan Brokerage Company, by you, for or on

behalf or on account of the Van Heynegan Brokerage Company, contracted with any tug for the towing of any vessel?

Ans. Yes, sir.

Q. What vessel?

Ans. The ones I said a while back. I have on a great many occasions made contracts,—verbal contracts for the towing of the schooners from Mobile to some other port in the Gulf, but not to any Mexican port.

Q. Is Mr. Thompson a member of that firm of Van Heynegan Brokerage Company?

Ans. Yes, sir.

Q. What is his position there?

Ans. President.

Q. Now, you said some four years ago, possibly a little more or a little less,—that you were in-
623 terested in a contract that was made with respect to a sailing vessel from where to where?

Ans. I think from Mobile to Gulfport, or from Mobile to Pensacola, or from Mobile to St. Andrews Bay. I don't just remember the incident.

Q. What I want to get at is the particular service that you are referring to,—in other words, I want to get the name of the vessel that was towed, and the name of the company or tugs that did the towing.

Ans. Well, the Mobile Towing & Wrecking Company did the towage, but as far as remembering the name of the vessel I cannot do that. The one I have in mind,—I can't remember. Just remember that the Mobile Towing & Wrecking Company did the towing.

Q. You do not recall from what port to what port that service was rendered?

Ans. No; but I am inclined to think it was from Mobile to St. Andrews Bay, if you want to pin me down.

Q. What I want to do is to get a proper reference to one with regard to the boat itself with the names,—now I understand you can't give the names of the vessels?

Ans. No, sir.

Q. And you can't give the names of the owners of the vessels?

Ans. No, sir.

Q. But you do remember that the party who
624 did the towing in Mobile was the Mobile Towing & Wrecking Company?

Ans. Yes, sir.

Q. Just where that vessel was from or just where she was going to, you cannot say positively?

Ans. No, sir.

Q. Do you know whether or not that particular service that you have in mind was subsequently confirmed in writing between the parties?

Ans. I know that it was not.

Q. That there was no written contract at all?

Ans. No written contract—no, sir.

Re-Direct Examination.

By Mr. Smith:

Q. Which particular vessel is it that Mr. Grace is referring to in asking you about the one instance?

Mr. Grace:

I object to the question. I understood the witness to state that he could not recall the names of vessels.

Ans. I cannot recall the names, but I could look it up in my files, but I cannot recall now to be positive about it.

Q. I understand that, but you are now speaking, as I understand, of some particular instance?

Ans. Yes, I have in mind, a particular instance.

Q. Do I understand you to say that that was the only instance in which you could state?

Ans. No, I said there were a great many
625 of them,—not a great many of them, but there are numbers of times when we have made arrangements for the towing of schooners from one port to another.

Q. What part does Mr. Thompson take in the business?

Ans. He is president of the business.

Q. But the question I am getting at is this; suppose the captain was in there and wanted you to make an arrangement for the towing of a boat, does Thompson give attention to that?

Ans. It would be given attention by whoever was in the office.

Re-Cross Examination

By Mr. Grace:

Q. Does Mr. Thompson keep in touch with the business of the Van Heynegan Brokerage Company?

Ans. Yes, sir.

Q. Always has?

Ans. Yes, sir.

New witness: L. A. SCOTT, a witness called on the part of the Respondent, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Smith:

Q. This is Captain L. A. Scott?

Ans. Yes, sir.

Q. What is your business?

Ans. Ship owner.

Q. How long have you been a ship owner?

626 Ans. I have been a ship owner, personally a ship owner, since 1915. I have been connected from 1902. I have been a partner with my brother, and have been a ship owner since 1902.

Q. Have you been owner of one vessel, or numbers of them?

Ans. Numbers of them.

Q. Out of what particular port do you operate?

Ans. Out of all Gulf Ports. To South Atlantic Ports, Windward Island, West Indies, and all other ports. We trade from the United States to the West Indies, Cuba and Porto Rico.

Q. How long have you been a ship owner in that business?

Ans. Since 1915.

Q. And how long have you been located in Mobile?

Ans. Since 1915. Personally I have. I have had a residence here, duirng that time.

Q. Since 1915, during the course of the time you have been in Mobile, I wish you would state whether or not, you have had occasion to have a number of vessels towed from one Gulf Port to another.

Ans. Yes, I have, had many, towed from Mobile to Pensacola and to St. Andrews Bay, and to Gulf Port and to Pascagoula. That is about the distance I have towed. I never towed one out to Texas.

Q. Did you ever have a tow to Mexico?

Ans. No, sir.

Q. Have you at any time ever entered into a written contract of towage, or were your contracts verbal?

Ans. Never more than towage for a certain
627 amount.

Q. That is not the question, I am asking you have you ever had a written contract?

Ans. No, sir, no, sir, no written contract at all.

Q. What is the method by which those contracts are ordinarily made,—whether they are written or verbal?

Ans. As far as I know, they are all verbal.

Q. Now what are the stipulations in them, if any, and what is ordinarily agreed upon?

Ans. It is agreed,—nothing more than an agreement, of so much to tow, a schooner from one port to another,—from Mobile to Pensacola, or some other pory [port]. You make an agreement to tow to the Bar.

Q. Are those the only stipulations that are ordinarily made?

Ans. Yes, sir.

Q. Did you ever have any stipulations in any of those verbal contracts which you speak of with a towing vessel, that the towing vessel could not be responsible for any damage that—

Mr. Grace:

I object to the question as leading and suggestive, and move to strike it out.

Ans. No, sir, I never have.

Mr. Grace:

I move to strike out the answer on the same grounds.

Q. I wish you would tell us when was the first time you ever heard it suggested that there was a custom

628 between tow boats and people that have towing done in the Gulf Ports, that they should have an understanding between themselves as a part of their contract that the tow boat should not be responsible for any injuries, that it did by reason of its negligence,—when was the first time you ever heard of such a thing?

Ans. It never was suggested to me until recently here,—about thirty days ago, when I had a schooner in Tampa I had to tow to Mobile. I do now know the name of the Company over there. Campey, the manager of some Company in Mobile mentioned it.

Q. What did he say?

Ans. He made me sign a contract.

Q. He made you sign a written contract?

Ans. Yes, sir.

Q. Is that the first time you ever made and signed a written contract?

Ans. Yes, sir.

Q. Have you got that written contract?

Ans. No, sir, he was to bring it to my office today.

Q. From your recollection, is there a stipulation in it, that the tow boat should not be responsible?

Ans. I am not sure of that, but I think there is some clause in it. That is something I do not remember exactly.

Q. Is that the first time you ever heard such a clause suggested?

Ans. The first time in my life.

Q. Was there anything said about it being the custom, or did he just want a written contract?

Ans. He said that that was the way they generally did between themselves, or similar to it. Mr. Campey made the contract.

Q. And, as I understand it, that was the first
629 time you ever heard such a provision suggested?

Ans. Yes, sir, and that was the first contract I ever signed.

Q. Now do you keep up with the way that kind of business is done in Mobile?

Ans. Yes, sir, I do keep up with it to a certain amount, because I have to contend with it all the time, that is, I have towing to be done.

Q. So, that as I understand you, that is the first written contract you ever made, and is the first one you ever heard of that had that stipulation in it?

Ans. The first one I ever had to sign.

Mr. Grace:

Don't lead him, you have asked him that three times already.

Cross Examination.

By Mr. Grace:

Q. What kind of vessels are you speaking of that you have towed?

Ans. Sailing vessels.

Q. Ocean going vessels?

Ans. Yes, sir.

Q. You have never had a vessel towed to a port in Mexico nor had one towed from a Mexican port to an American Gulf port?

A. No, sir.

Q. You have never had any towing done in Texas or Louisiana?

Ans. No, sir, never more than being towed up the harbor going in Orange, Port Arthur and Beau-
630 mont. You know that to get into those ports, you have to go up the river, and, of course, you have got to be towed in and towed out.

Q. That is simply harbor service?

Ans. Yes, sir.

Q. And whenever you get outside, you proceed to go under your own sail?

Ans. Yes.

Q. That, generally, is the kind of towing you refer to?

Ans. Yes, sir, that is what I am referring to in Texas.

Q. Who handles your towing at Beaumont?

Ans. The Picton Towboat Company and Saline Towing and Wrecking Company mostly do all of my business.

Q. Mr. Peckham is President of that concern, isn't he?

Ans. Yes, sir.

Q. You have never seen one of the instructions or circulars of the Picton Towboat Company, of which Mr. Peckham is President?

Ans. Yes, sir, I have.

Q. Have you ever seen one that contained the stipulation that towing is done at the risk of the tow, and not of the tow boat?

Ans. I cannot remember. I cannot tell you definitely about it, but I would not say it is not there, but I do not remember it, but I have got it in my office now, but I only read it over for the rates, and I have not studied into it. I do not think it is in there, ordinarily, but I cannot recall it clearly.

Q. So that at this time as to the business
631 you have had with the Texas concern, you are not certain whether that is in the rates or not.

Ans. No, I am not sure of it.

Q. But haven't you got a faint idea of the fact that it is in those circulars?

Ans. Yes, I have a faint idea that it is.

Q. Now have you had towing done in the State of Louisiana, either to or from any port in Louisiana?

Ans. No, sir; I have not personally. My brother has, but I have never had any.

Q. Have you the schedules of any of the towboat concerns in New Orleans, in your office?

Ans. No, sir.

Q. Have you seen any of them?

A. No, sir.

Q. Then you do not know, as a matter of fact, that that same character of stipulation is contained in that schedule?

Ans. No, sir, I do not.

Q. And, speaking of your experience in Florida, there,—you spoke of this written contract that was signed containing a stipulation of that sort?

Ans. Yes; I think it does contain such a stipulation.

Q. Do you know whether or not the schedules of the towboat concerns at Miami, Pensacola and Jacksonville all contain the stipulation in there that the towing vessels shall not be liable for the damage to the tow?

Ans. No, sir; I have towed in and out of Jacksonville, but I never had any such thing put up to me about a towboat not being responsible.

Q. Then you have had harbor towing done
632 there?

Ans. Yes, sir.

Q. In other words, they took you from the bar and after you got through in there, they took you back to the bar, but the towing you speak of over there does not relate to the Gulf towing?

A. No, sir.

Re-Direct Examination.

By Mr. Smith:

Q. Did you intend to say that you never had vessels towed from one Gulf port to another?

Ans. No, sir; I did not say that.

Q. I thought Mr. Grace said that you said "yes."

Ans. No; I have had schooners towed from Mobile, Gulfport, St. Andrews Bay and Pascagoula.

Q. At any rate, I just wanted to know what you intended to say now.

Ans. No, I said that I do not remember.

Q. About over what period of time have you been engaged in having vessels towed from one Gulf port to another?

Ans. Always because you have always got to be towed from one port to another in loading, as you may get a part of your cargo here and go to another port and get the balance of the cargo.

Q. You said you had a written contract very recently that had such a stipulation in it,—who was it that first put that to you?

633 Ans. I told you that was Canty, Manager in Mobile.

Q. At what place?

Ans. In Mobile.

Q. When was that?

Ans. Somewhere around about a month ago.

Re-Cross Examination.

By Mr. Grace:

Q. Mr. Canty, you say, made that here in Mobile?

Ans. He just gave me a copy to sign,—two copies to sign. Sign one for him and one for myself.

Q. Who is Mr. Canty?

Ans. He is manager of a barge towing company here. He runs from Mobile to Florida.

Q. In other words, it is a Mobile towing concern?

Ans. It is a Mobile and New Orleans concern, I think. I am not right sure but Mr. Canty is the manager.

Q. Was that stipulation for the towage from Mobile to Tampa or from Tampa to Mobile?

Ans. The schooner was in Tampa.

Q. The vessel came in a tow entirely?

Ans. Yes, sir.

Q. You spoke of being towed sometime between Mobile and Pensacola?

Ans. Yes, sir; many times.

Q. What was the occasion?

Ans. Just towing from there here to load. The vessel would be laying up in Mobile, and she might be chartered to load out of Pensacola or St. Andrews Bay, I will say, or out of a Gulf port, and of course naturally, you have got to tow them around.

Q. Who did the towing?

Ans. Mostly, the Mobile Towing & Wrecking
634 Company,—sometimes, the Gulf Towing & Wrecking Company.

Q. What sort of a concern is that Mobile Towing & Wrecking Co.?

Ans. It has got lots of towboats which can tow sailing vessels and steamers.

Q. How does it compare with the other towing concerns in Mobile?

Ans. Same thing so far as I know.

Q. What I mean is,—is it better equipped or otherwise?

Ans. I do not know. They have got boats that are more serviceable for the business than the others.

The witness was then excused.

LESLIE BODDEN, a witness called on behalf of the Respondents after having been first duly sworn, testified as follows:

Direct Examination.

Q. What is your name?

Ans. Leslie Bodden.

Q. What concern are you a member of?

Ans. Whitney & Bodden Shipping Company.

Q. What business are they in?

Ans. Owning and operating schooners.

Q. Operating in Mobile?

Ans. Yes, sir.

Q. How long have you been a member of that firm and in that business?

Ans. From the time the corporation was signed. I think it has been about—We operated ships before we were incorporated,—about 14 years.

635 Q. In the course of your business have you or not had occasion to have vessels towed from one Gulf port to another on various occasions?

Ans. Yes, sir.

Q. Now, how are those towages ordinarily arranged?

Ans. By verbal agreement, all that I have ever had.

Q. And what would be the terms of the verbal agreement?

Ans. To tow the vessel, for so much money, from one port to the other.

Q. Were there any other stipulations or understandings?

Ans. No, no special stipulations.

Q. And that has been your practice for fourteen years.

Ans. Yes, sir.

Q. Do you recall my having asked you within the last twenty minutes with regard to whether you ever heard of a suggestion that it should be understood between towboats and the owners of the vessels towed that the towboat should not be liable for any injuries that it did,—do you recall my asking you that?

Mr. Grace:

I object to the question on the ground that it is irrelevant, incompetent and immaterial whether this question was asked of the witness at any time, and further, that no foundation has been laid justifying the inquiries with regard to the subject matter of that question, and I move that the question be stricken from the record.

Ans. Yes, sir.

Q. I only asked you that question in order for me to ask a second question as to whether prior to the time I mentioned it to you within the last fifteen
636 or twenty minutes, you had ever heard of any such question

Mr. Grace:

I object to the question on the ground that the proper foundation has not been laid for this inquiry.

Ans. No, sir, I have never heard of any such question.

Mr. Grace:

I move that the answer be stricken out.

Q. Have you at any time outside of the question I asked you ever heard it suggested that the towboat towing the vessel would not be liable if it was at fault or otherwise?

Mr. Grace:

I object to the question upon the ground that proper foundation has not been laid for this inquiry.

Ans. No, sir.

637 Cross Examination.

By Mr. Grace:

Q. What is your business?

Ans. Owning and operating schooners.

Q. Between where and where?

Ans. I have operated ships all over the world during the war, but principally now from Gulf ports and South Atlantic ports to the West Indies.

Q. Well, for instance, have you ever had a vessel towed from any American Gulf port to a Mexican Gulf port?

Ans. No; I have had them vice versa though.

Q. You have had a vessel towed from a Mexican Gulf port to an American Gulf port?

Ans. Yes, sir.

Q. What vessel was that?

Ans. The Schooner "Stranger."

Q. From where?

Ans. From Tampico to Mobile.

Q. When?

Ans. In 1915 or 1916; I am not certain.

Q. Ten or eleven years ago?

Ans. Shortly after the commencement of the war,—'15 or '16.

Q. Who did the towing?

Ans. I do not recall. I think if I am not mistaken, it was the Mobile Towing & Wrecking Company, but I would not be positive.

Q. You are not certain whether they did the towing or not?

Ans. No; I am not certain. If I had known I was going to be asked that, I could have looked it up in my records.

Q. Is that the only instance of a vessel you have had towed from a Mexican Gulf port to an American Gulf port?

Ans. Yes, sir.

Q. What schooners have you now?

Ans. I think I have seven sailing vessels—
638 one bark and six schooners.

Q. Have you ever had any vessel towed from a Texas port to any Gulf port?

Ans. I do not recall it if I did.

Q. Have you ever had a vessel towed from a Louisiana port to any other Gulf port?

Ans. Yes, sir.

Q. Which ones?

Ans. I have had the Schooner M. Turner. I think there was probably others, but I recall that one as it was more recent.

Q. When was the Schooner M. Turner towed?

Ans. The Schooner M. Turner was towed I think, last November.

Q. Was there a written contract for that towage?

Ans. Not that I know of.

Q. You do not recall?

Ans. I do not know it if it was.

Q. You did not make the contract yourself?

Ans. I was not in Mobile at the time.

Q. So that personally you do not know what the terms or conditions of that contract were?

Ans. No, sir; I do not.

Q. And with respect to the towage of the Stranger from Tampico to Mexico, did you personally make that contract?

Ans. I do not recall if I did. I probably had some hand in it, but I do not recall.

Q. Do you remember whether or not that contract was in writing?

Ans. I do not think so.

Q. You do not remember though, do you?

Ans. I am pretty positive it was not.

Q. But you would not say as a fact that it
639 was not?

Ans. No; I would not swear positively it was not, but I am pretty sure it was not.

Q. While you are inclined to believe that at this time, but you would not swear as a matter of fact that it was not?

Ans. No, sir; I would not swear to that.

Q. What other instances of particular towage from one Gulf port to another Gulf port, can you recall at this time, that you were concerned in?

Ans. We had a vessel towed to Gulfport day before yesterday from Mobile.

Q. Did you make that contract personally?

Ans. No, sir; Captain Whitney made it.

Q. Who did the towing?

Ans. The Mobile Towing & Wrecking Company.

Q. Is there any other case that you can recall where your firm was concerned in any particular towage?

Ans. Yes; about a month or six weeks ago, we had one towed from Mobile to Gulfport.

Q. Do you know if that contract was in writing?

Ans. No, sir; it was not.

Q. Did you make it yourself?

Ans. No, sir; but I know it was not in writing though.

Q. Can you recall any other instance where your firm was interested in any particular towage between Gulf ports?

Ans. I could not name any particular instances, but we have had towing done more or less from
640 the time we have been in business, from one port to the other.

Q. It is of particular importance to us to get the name of the particular vessel that you may have in mind with regard to any towage service, and the ports between which the towage service was done, and the party who performed the towage service—can you give that?

Ans. I could not give you those details without I would refresh my memory. I came up here really not knowing what I was going to testify about. I know we have had towages more or less from the time we have been in business in this City as well as on the Atlantic. We have had vessels towed from Gulf ports to Cuba and back again.

Q. In each instance you have mentioned the Mobile Towing & Wrecking Company—was that the party who ordinarily did your towing?

Ans. Yes; they have been in business here longer than anyone else. We have had Pensacola people to do towing for us too—the Aiken Towing & Barge Company.

The witness was then excused.

641 JOHN G. MURPHY, a witness called on behalf of the Respondents, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Smith:

Q. What is your name?

Ans. John G. Murphy.

Q. What is your occupation at the present time?

Ans. Ship's manager.

Q. Are you the owner of any vessel?

Ans. Yes, sir.

Q. How long have you been a ship owner?

Ans. 14 years.

Q. Where do you live?

Ans. Mobile.

Q. Where do your ships operate?

Ans. Well, wherever we get the best freights We go between Porto Rica, Cuba, the Windward Islands and wherever we get cargo.

Q. What are the character of your vessels?

Ans. I operate three sailing vessels and two steamers.

Q. Now have you ever had occasion to have any vessels towed from one Gulf port to another?

Ans. Yes, sir.

Q. What Gulf ports have you had vessels towed to and from?

Ans. I have had vessels towed from Gulfport—from Gulfport to Mobile, and from Mobile to Gulfport; from Mobile to Tampa, from Tampa to Pascagoula and Mobile.

Q. Have you ever had any vessels towed to or from any Mexican Gulf ports?

Ans. No, sir.

Q. Cuba?

Ans. Yes, sir; many times. I have had three and four barges going to Cuba.

Q. How long have you been engaged in having vessels towed from one Gulf port to another?

642 A. Occasionally, from the time I started business fourteen years ago.

Q. How are those contracts for towage made?

Ans. My contracts have always been verbal. I have contracted for as high as $3800.00 with no written contracts whatever. I would contract for from three to four barges from Mobile to Cuba, for about $800.00 each.

Q. Was that everything that would be understood?

Mr. Grace:

I object to the question as being vague and indefinite and upon the further ground that it is irrelevant, incompetent and immaterial, and inadmissible, and move that it be stricken from the record.

Ans. Yes, sir; of course we have our barges insured you see.

Mr. Grace:

I also move that the answer be stricken out.

Q. Do I correctly understand that all of your contracts for towage have been verbal?

Ans. Yes, sir.

Q. Do I correctly understand that the only stipulation in each was in regard to how much they would charge you?

Mr. Grace:

I object to the question upon the ground that it is manifestly leading and suggestive, and I move that it be stricken from the record.

Ans. Yes, sir.

Mr. Grace:

I move to rule out the answer.

Q. Have you ever heard of there being a custom among people engaged in shipping and desiring to have boats towed from one Gulf port to another, that there was any understanding that if the tug was at fault, and there was damage to the tow, the tug would not be liable?

643 Mr. Grace:

I object to the question as leading and suggestive.

Ans. I have not heard of that.

Mr. Grace:

I move that the answer be stricken from the record.

Q. You say you have not heard of any such suggestion?

Mr. Grace:

I object to the question as leading and suggestive.

Ans. No, sir.

Mr. Grace:

I move that the answer be stricken from the record.

Q. When was the first time you ever heard of any such suggestion being made?

Ans. I have never heard of it before.

Cross Examination.

By Mr. Grace:

Q. Never heard it made by anybody before?

Ans. No, sir.

Q. Neither today or yesterday or last month or a year ago?

Ans. No, sir.

Q. Never heard anything of that kind?

Ans. No, sir.

Mr. Grace:

No further questions.

The witness was then excused.

644 TESTIMONY OF ROWLAND LINNFIELD, ON BEHALF OF RESPONDENT.

Filed May 31, 1926.

(Title Omitted.)

Testimony taken on behalf of the Respondents on Wednesday, May 19th, 1926, before Reginald H. Carter, Commissioner, pursuant to attached notice.

645 Appearances:

Messrs. Dart & Dart, (Mr. Henry P. Dart, Jr.), for the Respondents.

Messrs. John D., M. A. & Edwin H. Grace, (Mr. John D. Grace), for the Libelant.

Stipulation:

Signing, sealing, certification and filing are waived, and it is hereby agreed by and between counsel for the respective parties that the testimony herein may be taken down in shorthand and transcribed on the type-

writer, stenographer's fees to be a taxable disbursement, and copy of this testimony to be furnished to opposing counsel.

Objection: Mr. Grace:

Libelants object to the taking of this deposition on the grounds that the Court has heretofore, upon application of the Libelants, fixed the time within which Claimants should conclude the taking of their depositions, and in respect to that conclusion, fixed the time within which Libelants should conclude their rebuttal testimony. This objection, however, is not to be considered as applying to the testimony to be taken at Mobile during this week, which, by agreement of both parties is to be taken with the further condition that the time within which the Libelants should take their rebuttal testimony is correspondingly lengthened, but
646 outside of those particular depositions, the present deposition and any further depositions stand objected to on the grounds above stated.

Mr. Dart:

With reference to the objection just noted, we beg to say that during last week, namely on May the 14th, while counsel for libelants was absent from the city, we communicated with our correspondents in New York, Messrs. Bigham, Englar & Jones, requesting them to arrange with counsel for libelants for a date to take the deposition of Mr. Linnfield in New Orleans, but inasmuch as Mr. John D. Grace, who is personally in charge of this case, was absent from the city in New York and was not expected to return to New Orleans until May the 18th, we were unable to take the deposition during the past week, and were unable to take it until today.

May the 19th. We were ready to take the depositions during the past week, but for the reasons aforesaid, were unable to take the depositions sooner.

Mr. Grace:

We desire to have it noted that the absence from the city of Mr. John D. Grace, who is in charge of this case, was due to the fact that the respondents in this case had served upon him notice to take depositions in New York City in this particular case de bene esse, otherwise he would have been in this city all of
647 last week. More than that, whatever wires were sent by Mr. Dart to the New York counsel for Libelants in this case, no mention was made thereof to me until on Friday morning of last week, when I advised that I did not anticipate that I would be in New Orleans until Monday evening or Tuesday.

ROWLAND LINNFIELD, sworn and examined as a witness on behalf of the Respondents, testified as follows:

Direct Examination.

By Mr. Dart:

Q. What is your name?

A. Rowland Linnfield—R-o-w-l-a-n-d.

Q. What is your occupation?

A. Ship surveyor.

Q. Are you connected with any body or association engaged in the surveying of ships?

A. With the American Bureau of Shipping.

Q. What is the American Bureau of Shipping?

A. A classification society, covering the construction and registry and the examination of vessels.

Q. What is it also known as?

A. It has been some times called the American Lloyds.

Q. Are you the head of the New Orleans office of the American Bureau of Shipping?

A. Principal surveyor of the New Orleans
648 office.

Q. How long have you held that position?

A. Well, I have actually been in New Orleans since February, 1919. Prior to that time I had charge of this district from the latter part of 1917, but I was located at New York and Mobile, coming around the Gulf part of the time.

Q. How long have you been associated with the American Bureau of Shipping?

A. Since December, 1917.

Q. How long have you been a marine surveyor?

A. Well, exclusively as a surveyor, just since being with the American Bureau. Prior to that time, I had more or less survey experience as a private individual with insurance companies and others from, perhaps, 1910—1909 or 1910—I don't remember the exact date.

Q. How long have you been identified with the shipping business?

A. I have been mixed up with shipping since 1904.

Q. Do you consider that you are a qualified marine surveyor?

A. I feel that I am.

Objection: Mr. Grace:

I object to the question. The witness has stated his experience and it is for the Court to determine that point.

Q. During the course of your connection with the American Bureau of Shipping, what experience
649 have you had in the surveying of vessels?

A. Well, that is practically all that I have done since I have been with the Bureau, almost day in and day out, the examination of or passing on vessels, either by actual contact with them personally, or by examinations and reports from men under me.

Q. What experience have you had in examining the towing arrangements of vessels, that is to say, where a tow boat or other vessel is employed to tow another vessel, please state what experience you have had with reference to examining into towing arrangements?

A. Well, as to the exact amount, I wouldn't like to state, I don't really remember. I have done more or less of it around New Orleans, I have examined a great deal of stuff that went to Florida during the Florida boom, I have examined stuff that went to Mexico from time to time, both from here and from Mobile, and I have examined stuff transferred coastwise around the Gulf.

Q. Well, during the course of your business experience, have you frequently been called upon to examine the towing arrangements of vessels leaving New Orleans?

A. Yes, sir.

Q. Is that a usual or unusual experience with you?

A. Well, I would say it was really a usual
650 experience.

Q. Now when you are requested by the owners or underwriters of vessels to examine into the towing arrangements of vessels to be towed from New Orleans to other ports, in a general way, what is the nature of your task; what are you called upon to do and what do you actually do?

A. Well, the procedure would be about as follows: first, I would make an examination of the boat or vessel which it was intended to tow, and make recommendations which would render her, in my opinion, fit to be towed on the proposed voyage; then I outline with the owners' representative, if he is present, or with the representative of the towing company, outline to them the manner in which the hawsers, bridles and such like things will be arranged; then, in addition to that, we always, unless I have been very recently in touch with the tug boat, also make a casual examination of the tug boat to know in our own minds that she is fit to handle that particular tow.

Q. Well, in addition to handling the vessel to see whether she is fit to be towed, and in addition to examining the equipment and method in which the vessel is to be towed, such as the hawsers and bitts and towing apparatus, does your duty require you to do
651 anything else?

A. Well, I don't recall.

Q. Please state whether or not in that connection, it is part of your duty to examine into the terms of the agreement or contract of towing which may have been made between the owner of the vessel doing the towing and the vessel being towed.

Objection: Mr. Grace:

Objected to on the grounds that where a surveyor is called in by owner or underwriter to approve a vessel for seaworthiness, to approve the towing vessel for fitness, to approve the towing arrangements, that those terms have long been settled in law as referring merely to the physical condition of the vessel to be towed or the vessel which is intended to do the towing and the

physical arrangements for the towing service, such as bitts, towlines and so forth. We ask that the question be stricken out.

A. I have never considered it part of my duty, and have never made any attempt to, to examine any contract, as far as the towing is concerned, between the owner of the tug boat and the owner of the property to be towed.

Q. Well, have the owners of the vessels, the vessel doing the towing and the vessel being towed, ever submitted to you the contract under which the
652 service is to be performed and ask you to pass on those contracts?

A. No.

Q. Never been done?

A. Never been done.

Q. It is not part of your duty?

A. I have never considered it so.

653 STIPULATION REGARDING TESTIMONY OF CHARLES R. PAGES, AND EXHIBITS.

File July 20th, 1926.

(Titles Omitted.)

Stipulation Regarding Testimony of Charles R. Page.

Whereas, respondents herein desire to take the testimony of Charles R. Page, a resident of New York, New York, who is about to go abroad, expecting to leave New York City on May 1st, 1926, and respondents having is-

sued notice to take his deposition de bene esse on April 29, 1926, etc.; and counsel for respondents asserting, upon advice from said witness, that he will testify as follows, to-wit: that when binding the risk for the Fireman's Fund Insurance Company he was without knowledge towage contract released towing vessel from liability and would not have bound risk if he had knowledge; also, that he had no knowledge of alleged custom.

Now, therefore, it is hereby this day stipulated and agreed by and between the undersigned proctors for the libelants and the respondents herein that if Mr. Charles R. Page, of the Fireman's Fund Insurance Company were called and sworn as a witness in this case, he would testify as stated in telegram from Bigham, Englar and Jones to Dart and Dart, dated April 25th, 1926, copy of which is hereunto annexed, that when binding the risk for the Fireman's Fund Insurance Company he was without knowledge towage contract released towing vessel from liability and would not have bound risk if he had knowledge; also that he had no knowledge alleged custom.

Dated at New Orleans, La., April 28th, 1926.

(Signed) JOHN D., M. A. & EDWIN H. GRACE,
By JOHN D. GRACE,
Proctors for Libelants.

(Signed) DART AND DART,
Proctors for Respondents.

654 WESTERN UNION TELEGRAM.

Copy.

Class of Service Desired—Telegram.

114FX 19
FX New York NY 1122A Apr 27 1926

Dart and Dart

1100 Canal Commercial Bldg New Orleans La

Wash Gray proposed stipulation satisfactory except that words would not have written policy should be would not have bound risk.

BIGHAM ENGLAR AND JONES
1025A

655 WESTERN UNION TELEGRAM.

Copy.

Class of Service Desired—Telegram.

NOLA April 26th 4:30 PM

Bigham Englar and Jones

64 Wall Street New York City New York

Wash Gray Grace will stipulate regarding pages deposition as follows quote that if Charles R. Page of the Firemans Fund were called and sworn as a witness in this case he would testify that when binding risk he was without knowledge towing contract released tow-

ing vessel from liability and would not have written policy if he had knowledge also that he had no knowledge alleged custom unquote Grace advises if foregoing stipulation not satisfactory he will move to suppress deposition on account he is actively engaged in Federal Court here and cannot possibly attend hearing on twenty-ninth please advise if form stipulation satisfactory.

DART AND DART

HPDJr K
CHC D&D

656 WESTERN UNION TELEGRAM.

Copy.

Class of Service Desired—Telegram.

NA45172NL New York NY 23 1926 Apr 23 PM 5 29
Dart & Dart

1100 Canal Commercial Bldg New Orleans La

Wash Gray Page underwriter Firemans Fund policy sailing Europe May first accordingly please serve notice taking his deposition April twenty ninth unless Grace stipulates that Page when binding risk was without knowledge towage contract released towing vessel from liability and would not have written policy if he had knowledge also that he had no knowledge alleged custom stop have conferred Page and you can give Grace our word he will so testify.

BIGHAM ENGLAR AND JONES

657 RULE TO SHOW CAUSE WHY NOTICE TO TAKE TESTIMONY SHOULD NOT BE ANNULLED AND EXHIBITS.

Filed Apr. 23, 1926.

(Titles Omitted.)

Upon motion of libelant in each one of the above entitled and numbered causes, and upon suggesting that after the elapse of a long continued period within which respondents could have concluded the taking of all their testimony in said causes, they remained idle, without good reason until now, when this cause stands set down for hearing on the third day of May, next; of which fixing proctors for respondents were duly notified on the 29th day of March, 1926—approximately thirty-six days in advance. (See letter attached hereto marked "Exhibit A.")

That on the fifth day of April, proctors for respondents acknowledged receipt of the above referred to letter, and advised that for reasons stated in their own letter, they could not say definitely if they would be ready for said date. We respectfully submit that the said reasons are not good and sufficient for any delay in hearing of these consolidated causes. (See said letter from respondents attached hereto, marked "Exhibit B.")

658 That immediately upon receipt of said letter libelant replied thereto, (April 6th) protesting against the long continued period of time respondents

had taken to get in their evidence, calling their attention to the rules of Court on this subject, and to the fact that over a year prior thereto respondents were requested to get in any further testimony they might desire to take; advising that libelant would refuse to consent to a continuance of the case; and still further advising respondents that:

"We call to your attention, too, to the fact that well over a month's notice was given you of the date fixed for a hearing of this case and that your letter comes to us nearly two weeks after the fixing of the cause, suggesting delays, etc." (See Exhibit "C," hereto attached.)

Finally, in the afternoon of April 21, 1926, respondents served upon proctor for libelant a notice that they would examine

"Charles R. Page, M. M. Pease, R. L. Billin, Henry P. Winter, T. Catesby Jones, John Doe, Richard Roe and others be bene esse in New York, N. Y., on the 10th day of May, 1926, and from day to day thereafter, etc."

That upon further suggesting that all of said named witnesses, (excepting the fictitious John Doe and Richard Roe) have, at all times, since the commencement of these suits, been within the ready reach of respondents herein; they being, in fact, one of the attorneys of record for respondents and officers or agents of certain of respondent companies.

Libelant still further suggests that the said notice is not based upon any order of Court; nor does it purport to be taken under any statute of the United States; nor is it in conformity with any statute of the United States as is evidenced by the copy of said notice herein attached and hereby made a part hereof.

That considering the foregoing matters libelants request that this Honorable Court will enter order annulling and setting aside the said notice as not
659 being justified by any statutory law; nor in accord with the procedure of this Honorable Court; it is therefore,

Ordered, that the respondents in the above named consolidated suits, show cause on the 26th day of April, 1926, at 11 o'clock, why the above referred to notice, to take testimony, should not be set aside and annulled as not warranted in law, or by the practice of this Honorable Court; or that such other or further order entered herein as to right and justice may appertain.

April 22, 1926, service accepted reserving all rights.

(Signed) DART & DART,
Proctors for Respondents.

660 EXHIBIT A.

Copy.

March 29, 1926.

The Compania de Navegacion, Interior S. A. vs. Fireman's Fund Insurance Co., et als., numbered 17,205 to 17,215, both inclusive.

Messrs. Dart & Dart,
Canal-Commercial Bank Bldg.,
New Orleans, La.

Attention: Mr. Henry P. Dart, Jr.

Dear Sirs:

The above entitled and numbered consolidated causes are set down for hearing on the merits on Monday, May 3, 1926, at 11 a. m.

Kindly acknowledge receipt hereof and very much oblige,

Yours very truly,

JOHN D., M. A., & EDWIN H. GRACE,
By (Sgd.) JOHN D. GRACE.

JDG:F

661 "EXHIBIT B."

Copy.

Dart & Dart.

Attorneys and Counsellors at Law.

New Orleans, April 5th, 1926.

Messrs. John D., M. A. & Edwin H. Grace,
1401 Hibernia Bank Bldg.,
New Orleans, La.

Re: Compania De Navegacion Interior S. A. vs. Fireman's Fund Insurance Co., et als., No. 17,205 to 17,215, both inclusive.

Dear Sirs:

We have your favor of March 29th, advising us that this case is set for trial on Monday, May 3rd, 1926, at 11 a. m. We have written our correspondents on the subject but are not quite sure whether it will be convenient for them to be ready on that date, as it is possible that a representative of their firm would like to participate in the argument, and we have not heard from Mr. Kelly of Houston, who is also interested in the case.

As the writer explained to you, he personally is anxious to get the case disposed of, but it is possible that we may be compelled to take the testimony of one or two witnesses before the record is complete. We will do everything in our power to accommodate you in getting the case tried, but we are compelled to wait until we hear from our correspondents and from Mr. Kelley before advising you definitely.

Yours very truly,

(Sgd.) DART AND DART.

JPDJr/GE

662 "EXHIBIT C."

Copy.

April 6, 1926.

Compania de Navegacion Interior S. A. vs. Fireman's Fund Insurance Co., et al., No. 17,205 to 17,215, both inclusive.

Messrs. Dart & Dart, Lawyers,
1100 Canal-Commercial Building,
New Orleans, La.

Dear Sirs:

We have yours [acknowledging receipt of ours—J. D. G.] correction, of the 29th ult., in the above matter. You will recall, no doubt, that during the last summer you stated to our client that you were ready for trial; so, also, we have so understood from you during many months passed; the difficulty in having the case heard, was, as you know, due to lack of opportunity on account of the crowded condition of the docket of the Court, and a disinclination on our and your part to take it up before Judge Hale who, it was understood was here for only a limited time; and we might make preparation to argue it only to find that the Judge would not be here; as actually occurred in the "Per Skogland" and other cases, your and our firm had fixed for hearing before Judge Hale.

However, you were requested by us over a year ago, to get in any testimony you might desire to put before the Court in this case; and was then told we had one witness whom we could use on proof of custom as well, with possibly, others in rebuttal, but were waiting on you.

It was only on our full complete understanding that as you had sought to locate two certain witnesses without avail and had given up the idea of ever getting them, and that you, too, were anxious to get to trial, this case was set down on the docket for final hearing.

Considering the rule of Court in relation to taking testimony by each side, and considering the great annoyance our client has suffered through the manifestly long delays which have run; you will please understand we will not consent to any continuance for any purpose; as this case must be pushed through to conclusion.

We will thank you to advise us what are
663 your present intentions; and if you contemplate going before the Court for any order to permit the taking of further testimony that we be duly notified so that we may be able to present our side at that time, rather than be compelled to take rule to show cause why such order, if any be granted should not be recalled.

We call your attention too, to the fact that well over a month's notice was given you of the date fixed for a hearing of this case and that your letter comes to us nearly two weeks after the fixing of the cause, suggesting delays, etc.

We will not consent to any delay.

Yours very truly,

JOHN D., M. A., & EDWIN H. GRACE,

By (Sgd.) JOHN D. GRACE.

JDG:F

664 (Titles Omitted.)

To:
Messrs. John D., M. A., and Edwin H. Grace,
Proctors for Libelant,
Hibernia Bank Bldg.,
New Orleans, La.

Please take notice that Charles R. Page, M. M. Pease, R. L. Billin, Harry P. Winters, T. Catesby Jones, John Doe, Richard Roe and others, all material witnesses in the above numbered and entitled cause, who reside in the City of New York, State of New York, at a distance greater than one hundred miles from the place where the Court is held wherein this cause is pending, will be examined de bene esse on the part of respondent herein, before Edward A. Quinlan, Notary Public, duly commissioned, sworn and qualified in and for the City of New York, or before some other officer authorized by law to take depositions at the office of Bigham, Englar and Jones, No. 64 Wall Street, New York City, commencing at ten o'clock in the forenoon of Mon-
665 day, May 10th, 1926, and from day to day thereafter until the examination is completed, at which time and place you are hereby notified to be present and put interrogatories if you shall think fit.

Dated at New Orleans, La., April 21st, 1926.

Yours very truly,

(Sgd.) DART AND DART,
Proctors for Respondents.

We object and except to this alleged notice, particularly on the grounds that no order of Court has been granted for the examination of the above named witnesses; so, too, that there is no authority in law for the proposed examination under the above so called notice;

that it does not give the names of the witnesses proposed to be examined; that this case is fixed for hearing on its merits before the Court on May 3, 1926. All rights are reserved to urge such other and proper exceptions as and when and where libelant may deem proper. New Orleans, April 22, 1926.

(Sgd.) JOHN D., M. A., & EDWIN H. GRACE,
By JOHN D. GRACE,
Proctors for Libelant.

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666 MOTION TO SET ASIDE ASSIGNMENT OF CASE FOR TRIAL.

Filed Apr. 23, 1926.

(Titles Omitted.)

Upon motion of respondents in each of the above entitled and numbered causes through their proctors, Dart & Dart, and on suggesting that respondents have been advised by proctors for libelant that said causes on motion of libelant have been set down for trial on the merits on Monday, May 3, 1926; on further suggesting that respondents have not completed the taking of their testimony and that it is necessary that they should take the depositions of various witnesses, namely Charles R. Page, M. M. Pease, R. L. Billin, Harry P. Winters, T. Catesby Jones and others; on further suggesting that respondents have served notice on proctors for libelant of their intention to take the depositions of said witnesses in New York, on Monday, May 10, 1926, at 10:00

o'clock a. m.; on further suggesting that libelant did not complete the taking of their testimony until January 6, 1926, when they took the testimony of Lester F. Alexander, one of the witnesses for libelant; and
667 on further suggesting that respondents have not had sufficient time to take testimony to off set the effect of the testimony of libelant's witnesses and particularly testimony of said Lester F. Alexander and that the assignment of the case for trial on May 3, 1926, should be set aside; and that respondents should be granted a delay of sixty days to take their evidence before the case is assigned for trial.

It is ordered that libelant show cause on Monday, April 26, 1926, at 10:00 o'clock a. m. why the assignment of the case on the merits on Monday, May 3, 1926, at 11:00 o'clock a. m. should not be set aside and why respondents should not be granted a delay of sixty days for the purpose of completing their evidence.

New Orleans, La., April 23, 1926.

(Sgd.) LOUIS H. BURNS,
Judge.

Service accepted reserving all rights. New Orleans, La., April 23, 1926.

(Sgd.) JOHN D., M. A., & EDWIN H. GRACE,
By JOHN D. GRACE,
Proctors for Libelant.

668 ANSWER TO RULE TO VACATE NOTICE.

Filed April 23, 1926.

United States District Court,
Eastern District of Louisiana.

(Title Omitted.)

Answer of Respondents to Rule of Libelants to Vacate Notice to Take Depositions.

Now comes Fireman's Fund Insurance Co.; Phoenix Insurance Co.; Globe & Rutgers Fire Insurance Co.; Franklin Fire Insurance Co.; Springfield Fire & Marine Insurance Co.; Aetna Insurance Co.; Western Assurance Co.; London & Liverpool & Globe Insurance Co.; National Liberty Insurance Co.; Hartford Insurance Co.; Northwestern Fire & Marine Insurance Co., respondents in the above numbered and entitled causes, and for answer to the motion to set aside the notice served by respondents to take testimony, respectfully shows that libelants did not complete the taking of their testimony herein until January 6, 1926, when libelant took the deposition of Lester F. Alexander, and that respondents are not required under the rules and practice of this Court to take their evidence until the libelants have completed their case; that respondents have not had sufficient time to complete the taking of their depositions and that it is necessary that they take the depositions de bene esse under Revised Statute 866 of the witnesses named in the notice, to-wit, Charles R. Page, M. M. Pease, R. L. Billin, Harry P. Winters, T. Catesby Jones and other necessary and material witnesses in the employ of respondents before this case is

submitted for trial on the merits that in addition to the witnesses named respondent desires to take the depositions of certain offficers and/or employes and/or agents of respondents, the names of whom are unknown to proctors for respondents at this time, but whom respondents have designated by the fictitious names of John Doe and Richard Roe in the notice; that respondents are entitled to a reasonable opportunity to take the depositions of said witnesses and gave notice to take the same on May 10th, 1926, so as to give proctors for libelant ample time to attend the taking of said depositions, if they so desire; and that the assignment of the case for trial on May 3, 1926, was made on an exparte motion of proctors for libelant, to which respondents have not consented and that the assignment of the
669 case for trial on said date was premature and should be annulled and set aside and the cause continued until such time as will enable respondents to take the testimony of the witnesses aforesaid.

Wherefore respondents pray that the motion herein field to vacate the notice to take the depositions aforesaid should be dismissed at libelant's cost and that the assignment of the case for trial on May 3, 1926, should be set aside and for all general and equitable relief.

(Sgd.) DART AND DART,
Proctors for Respondents.

670 HEARING ON RULE OF LIBELANT TO ANNUL NOTICE TO TAKE TESTIMONY, AND ALSO, ON RULE OF RESPONDENT TO SET ASIDE ASSIGNMENT OF CASES AND ORDER SETTING SAME DOWN FOR MAY 31, 1926, ETC.

Extract from the Minutes.

February Term, 1926.

New Orleans, Monday, April 26th, 1926.

Court met pursuant to adjournment.

Present: Hon. Louis H. Burns, Judge.

(Title Omitted.)

The rule fixed herein of April 23rd, 1926, by libelants to annul notice to take testimony and also the rule filed by respondents to set aside the assignment of the above numbered and entitled consolidated causes for trial on May 3rd, came on this day for hearing.

Present: John D. Grace, of counsel for libelants,

Present: Henry P. Dart, Jr., of counsel for respondents.

Whereupon, after hearing arguments of counsel and the matter having been submitted to the Court this 26th day of April, 1926, it is ordered that this consolidated cause be set down for trial on Monday, May 31st, 1926, at 11 o'clock a. m., pending which time additional testimony may be taken on behalf of the respondents not

later than on or about May 10th, 1926, and also that rebuttal testimony may be taken by libelant not later than on or about May 20, 1926—the said testimony to be taken under Section 863 of the Revised Statutes of the United States.

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671 HEARING AND SUBMISSION.

Extract from the Minutes.

May Term, 1926.

New Orleans, Monday, May 31st, 1926.

Court met pursuant to adjournment.

Present: Hon. Louis H. Burns, Judge.

Present: Hon. Benjamin C. Dawkins, Judge.

Proceedings before Honorable Louis H. Burns, District Judge.

(Title Omitted.)

This consolidated cause came on this day to be heard upon the pleadings, exhibits, evidence and testimony offered on behalf of the respective parties.

Present: John D. Grace, of counsel for the libelants,

Present. Henry P. Dart, Jr., and Robert Kelly, of counsel for defendants;

and was argued by proctors for the parties in interest and submitted, when the Court took time to consider.

672 NOTE OF EVIDENCE, AND EXHIBITS, FOR LIBELANT.

Filed April 26, 1926.

In the District Court of the United States for the Eastern District of Louisiana.

(Titles Omitted.)

On hearing in these consolidated causes on rule taken by libelant to annul, avoid and set aside notice to take testimony in New York City on May 10, 1926, and on rule taken by claimants to postpone the hearing of this case for a period of ninety days and oral motion to set aside the notice served April 24, 1926, to take the testimony of Charles R. Page in New York City, at 10 o'clock in the forenoon on the 29th day of April, 1926, libelant offers the following documents:

1. Copy of letter written by counsel for libelants in the above causes under date March 17th, 1924, requesting libelants to expedite the taking of their testimony in these cases.

2. Reply letter from Messrs. Dart, Kernan & Dart, dated March 26, 1924, acknowledging receipt of letter from libelants under date March 17th, copy of which is shown in above referred to exhibit 1, in which letter from counsel for claims the concluding paragraph recites:

"In any event, we will endeavor to co-operate with you in getting evidence in and submitting the case this term."

3. The copy of letter from attorneys for libelants dated December 7, 1925, which is attached to the rule taken by libelants.

4. The original of letter from counsel for claimants under date of December 19th, acknowledging letter from libelants of date Decmeber 7th, referred to above; attached to rule taken.

5. Rule 63 of this Honorable Court, which fixed the "Time for Taking Evidence," which said Rule reads as follows:

"63. Time for Taking Evidence.

After issue joined the libelant shall have sixty days in which to take his evidence and thereafter the claimant or respondent shall have the like time to take his evidence, and no more, unless for cause shown the Court shall enlarge or restrict the time, and provided the the case is not heard in open Court."

(Signed) JOHN D., M. A. & EDWIN H. GRACE,
JOHN D. GRACE,
Proctors for Libelants.

673 March 17, 1924.

Tug "Wash Gray" Insurance. Our File No. 2095.

Messrs. Dart, Kernan & Dart, Lawyers,
Canal-Commercial Building,
Nwe Orleans, La.

Attention: Henry P. Dart, Jr., Esq.

Dear Sirs:

In the above matter libelants are ready, willing and most anxious to go ahead with the taking of testi-

mony at Houston, Texas, proposed by claimant, but in as much as your Mr. Henry P. Dart, Jr., advises us that there is a case coming up before the States Supreme Court, fixed for hearing for 24th inst., which will prevent him from attending at such hearing at such time as he can secure attendance of his client's witnesses, we feel sure that there is now nothing for us to do but consent to the continuances asked for.

Urging you to get your testimony at earliest convenient date, we remain,

Yours very truly,

.....

JDG:F

674 (Letter Head of):

Dart & Dart.

December 19th, 1925.

Messrs. John D. & M. A. Grace,
1401 Hibernia Bank Bldg.,
New Orleans, La.

Re: Compagnia de Navegacion Interior SS vs. Various Insurance Companies, Your File No. 2095.

Dear Sirs:

We have your letter of December 7th, and in reply beg to say that we will be glad to complete the taking of testimony and submit this case at the earliest possible time.

We still hope, however, to be able to take the depositions of two witnesses to whom we have written but from whom we have received no answer. If we are unable to locate these witnesses, we will have to go ahead without them.

The delay in this case has not been due to any fault of ours or yours, but to circumstances beyond our control, and we have no desire to delay the trial. On the contrary we will do everything in our power to get the case tried and submitted.

Yours very truly,

(Sgd.) DART AND DART.

HPDJr/GE

675 Letter Head of

Dart, Kernan & Dart.

March 26, 1924.

Messrs. John D. and M. A. Grace,
Hibernia Bank Building,
New Orleans, Louisiana.

Gentlemen:

We have your letter of March 17th, and in reply beg to say that we will endeavor to take our depositions as soon as the writer can dispose of certain pressing cases now pending and fixed for trial in Court.

We trust that you will explain the situation to Capt. Barbour, also call his attention to the fact that we have already endeavored to accommodate him at considerable trouble to ourselves. You will recall that the writer continued a case in the State Supreme Court in order to facilitate him in giving his deposition, as well as in taking the deposition of your witnesses in Houston and Galveston last fall, on five days' notice. Later on, we arranged to take the testimony of some of our witnesses in Houston, but changed our plans at your request, due to the absence of Capt. Barbour in Mexico.

In any event, we will endeavor to co-operate with you in getting the evidence in and submitting the case this term.

Yours very truly,

(Signed) DART, KERNAN & DART.

HPDJr/AB

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676 OPINION OF THE COURT.

Filed July 9, 1926.

(Titles Omitted.)

677 These suits were commenced by eleven libels against the defendant insurers, each for their respective contract portion of eighty-five thousand dollars ($85,000.00), with interest from July 20, 1922, for the total loss of the steam tug "Wash Gray" on the Gulf of Mexico, in tow of the steamship "Freeport Sulphur No. 1," from Tampico, Mexico, to Galveston, Texas, via Freeport, Texas, on June 8, 1922. The facts sustained by the evidence will appear in course of this opinion.

The "Wash Gray" was a small tug designed for inland waters eighty-seven and one-half feet long, nineteen feet beam, with nine feet depth of hold, and of one hundred and five tons. She was insured specially for this sea-voyage to be towed by a particular ship, the "Freeport Sulphur No. 1," which was in regular trade on the Gulf of Mexico, and measured three hundred nine feet long, forty-five feet beam, with twenty-two and one-half feet depth, and of approximately three thousand tons displacement.

Because of the "Wash Gray's" size, type and the open sea voyage intended, the insurance risk was unusual, and therefore, when application was made for insurance, the underwriters required an inspection for seaworthiness, general fitness and towing arrangements for that voyage. For the purpose two marine surveyors, representing various underwriters, made a thorough, critical inspection, followed by recommendations for certain overhauling, particularly of her towing-bitts and decking, for the planking up of doors, ports, windows and other openings, for her pumps and also for her complement of men. They formally reported to the underwriters that these requirements had been complied with, certified her seaworthiness, and particularly her fitness for the particular voyage contemplated. Further because of the extra hazardous risk involved in the transit of this small inland vessel in tow at sea, the premiums were rated up considerably by the underwriters. These varied, in the different policies, between one and one-half to two and one-eighth percent.

The "Wash Gray" fresh water and fuel tanks were filled and were sufficient to sustain her for at least one week, whereas the voyage of some four hundred and twenty miles ordinarily was possible in say some forty-five or fifty hours. She left Tampico some three hundred feet astern of the steamship towing her
678 on a new eight inch hawser made fast to her forward bitts, paid out double, on the evening of June 6, 1922. The weather was fair and the sea calm. She followed nicely, handled well, and so continued in tow through that evening and night and through the next day, making some nine miles per hour with no straining or difficulty. Ordinarily, under her own power, she was good for from ten to twelve miles per hour.

During the evening of June 7 came a fresh to strong northwesterly breeze. Later the weather grew squally, until about eight o'clock, when the wind reached some twenty-five miles, with occasional puffs or gusts of greater velocity. Because of these and a cross current and swell, the sea grew choppy, with waves running up four to five feet from trough to crest, and sufficient to break over her head.

As night wore on, the rough weather and choppy seas put a strain on the little vessel. She had up all steam necessary to work her pumps. The mate was sent below and in a few minutes reported to the captain that the forward bitts had worked loose, that her seams were opening, and she was taking water rapidly. The pounding and straining continued until she made more water than her pumps could discharge. At about 11 o'clock, the tug and tow being then little more than one hundred miles from Freeport, Texas, or three-fourths of the voyage complete, the captain signalled by a red light to the towing ship ahead to stop. The water in the tug had rolled forward, thus bringing her head down. At this juncture the lines were cut. As soon as the line was cut her head came up and the boat righted herself. In about fifteen minutes the "Freeport Sulphur No. 1" came alongside and stood by. Its master was then notified that the tug could stand no more pulling. Notwithstanding the pumps were continued working, the water kept gaining on them, until, at about 2:45 a. m., the captain and crew of the tug asked to be taken aboard the ship for safety. The latter then stood by until daylight, when the master sent his engineer, mate and some six men on board the tug to attempt saving her. They found plenty of fuel, but no fresh water in the boiler. They got up fire, filled the boiler by a hose from the ship, whilst the hand-pumps were kept working, but the

679 accumulating water put the fire out before steam could be got up. They were thus compelled to abandon further effort. In taking his men aboard ship, the tug was made fast in tow, at about 10 a. m. of June 8, proceeding at the very slow speed of about one mile per hour. At about 10:30 a. m., the tug began to sink slowly, whereupon the ship came to a standstill, and as the tug went down the hawser was ordered cut, at about 11:20 a. m.

Upon demand being made for the insurance and the submission of proofs of loss, several of the underwriters denied liability on the ground of unseaworthiness.

For convenience, the following excerpts are quoted from the policies of Marine Insuranct:

"It is the intent of this Insurance Company by this policy to fully indemnify the Insured * * * against the adventures and perils of the Harbors, Bays, Sounds, Seas, Rivers and other waters as above named. * * * Excepting always all claims arising from or caused by the following or other legally excluded causes, viz: * * * From rottenness * * * And it is understood that no loss is to be paid arising from any negligence in not keeping the vessel well pumped out excepting in case of accident. * * *"

"Warranted by the Insured that the vessel shall at all times during the continuance of this policy, be tight and well found in anchors, cable, rigging, tackle and apparel, as is usual and customary and proper for safe navigation according to the usage and custom. * * *"

By rider and rubber-stamp clauses variously attached or inserted in the policies:

"Any agreement, contract or act, past or future, positive or implied, by the Insured whereby any right of recovery of the insured against any vessel, person or corporation is replaced, decreased, transferred or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement, contract or act, shall render this policy null and void as to the amount of any loss or damage, but the Company's right to retain or recover, the full premium shall not be affected."

By rider and rubber stamp clauses variously attached or inserted in the policies:

"Any agreement, contract or act, past or future, positive or implied, by the Insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost, which would, on acceptance of abandonment, or payment of loss by this company, belong to this Company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the Company's right to retain or recover the full premium shall not be affected."

680 Libelant's contention is that the loss of the tug "Wash Gray," under these policies, was by a peril insured against, viz: a peril of the sea, quoting definitions from Joyce on Insurance, Vol. 4, Par. 2797, as being all inclusive of all damages to which marine adventure is subject, and citing Klein vs. Glove and Rutgers Fire Insurance Company, 2 Fed. (2nd) 137, wherein District Judge Gilson was quoted and affirmed on appeal. He refused to accept the literal definitions because of the variations between the under-

lying facts in the case before him and those in the cited cases where definitions are given. He said: "In arriving at the meaning of the terms in the present policy, we must keep in mind the kind of boat insured, the voyage contemplated, and the nature of the risk assumed. The "Tornado" was an up-river steamboat, which under the terms of the policy, was to be towed over the Mississippi below New Orleans and a part of the Gulf of Mexico, waters which it was not designed to regularly traverse. * * *

"Under the circumstances it can not be claimed that the libelant impliedly warranted the boat as seaworthy to the extent of being able to withstand all winds and waves in the lower river and Gulf of Mexico, except such as were extraordinary. * * * The implied warranty of libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its type."

The contrary contentions by respondent are:

1. That the loss was not caused by any peril insured against.

2. That the tug was not seaworthy, and therefore the risk never attached.

3. That the release of liability contained in the contract of towage was a fact material to the risk which was concealed from and not disclosed to or known by the underwriters, and the policies were therefore avoided.

681 4. That the tug was negligently towed at too great a rate of speed, proximately causing the loss, and that no recovery can be had because any right of recovery which the underwriters may have had was released by the contract of towage.

The general consideration presented by these issues turns upon the character of the contract sued upon. In the case of Peters vs. Warren Ins. Co., 14 Pet. 99-108, 10 L. Ed. 371, cited by libelant, the Supreme Court said:

"If there be any commercial contract which more than any other required the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of Insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

And the general rule is that Insurance policies shall be liberally interpreted in favor of the assured, and that doubtful provisions are to be construed against the insurer. Liverpool, London and Glove Ins. Co. vs. McNeill, 32 C. C. A. 189, 59 U. S. App. 499; 89 Fed. 137, citing I Woods Ins. Sec. 58; National Bank vs. Ins. Co., 95 U. S. 673; Grace vs. Ins. Co., 109 U. S. 278-282.

Taking up the contentions made as stated, the first makes direct issue with the libelant's contention as to the meaning of the term peril of the sea. Upon this point I am fully persuaded by the carefully considered opinion in the "Tornado" case, cited and briefly quoted supra, and conclude that the implied warranty of the contract was that the "Wash Gray" was a seaworthy inland water vessel, and was able to withstand all

ordinary perils of navigation upon such water, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its size and type. In my opinion this is fortified by the fact that nearly three-fourths of the voyage contemplated by the contract had been concluded in ordinary, and some of it in extraordinary weather and sea conditions before there was any detriment or suggested danger; that the weather condition after 8 p. m., on June 7, the second night out, when the evidence clearly shows the wind attained a velocity of twenty-five miles an hour, punctuated with puffs of greater velocity, and the sea was choppy with waves running approximately four or five feet high. This, for a vessel of its size and type, was an extraordinary condition, amounting, under the circumstances, to such peril of the sea as the
682 contract contemplated. The entry on the log of June 7 of the big sea-going ship "Freeport Sulphur No. 1" showing: "Light E. wind, small swell; frequent showers," marked in the left margin 8 p. m., preceeded by an untimed entry "Light East-breeze, and squally small swell," is the only weather entry contained therein during that night or the next morning before 11:12 a. m., when the entry of the sinking appears, timed at 11:12 a. m. The log upon this point is inconclusive, to say the least. But considering it in the light of the testimony, I am convinced that, even if the entry could be assumed to mean a continuing condition, on the theory that no entry would have been made until the next change of weather condition, which is, of course, not the case, because the log-book shows unmistakably that the entries are penciled rather capriciously, irregularly and altogether unreliably. But, I repeat, even if so construed, the terms used would have to be considered as purely relative. What amounts to a lightbreeze,

or a small swell, or a choppy sea, as logged for a large ocean-going steel vessel would be relatively, if logged for a little inland wooden tug, with two or three feet of freeboard, an extremely dangerous gale and rough sea. The first would ride comfortably, safely and easily, while the other would toss and pound furiously, strain her timbers, lose the caulking of her butts and seams, and so contrast the comparative calm for one to the comparative fury for the other. The oral testimony, however, makes such speculation and refinement unnecessary, since it convincingly shows that for the "Wash Gray," in the open Gulf, the wind and the condition of the sea were extremely perilous; that both the towing ship, its officers and crew, and the crew of the little tug omitted nothing that good seamanship, skill and prudence would indicate.

When the bitts were found to be loosed from the straining and pounding of the little vessel, a Spanish windlass was rigged to brace them back in place, the pumps, both in hand and steam, were worked full power and time in an effort to discharge the water pouring in her open seams; that the proximate and efficient cause of the sinking and loss was due to the extraordinary condition of weather and sea, the unusual peril, irresistible force or overwhelming power, constituting
683 the peril insured against by the contract. Upon this point the libelant has amply sustained the burden of proof.

The second contention as to seaworthiness is in no better case. Libelant's case, upon this point, does not depend entirely on the fact that, as a condition precedent to the underwriting, the insurers required and obtained inspections, detailed recommendations of two expert marine surveyors, and a certificate of compliance with all requirements deemed by them necessary

to show that the "Wash Gray" was seaworthy and fit, equipped and apparelled with a view to the particular voyage, in tow of the particular ship to Freeport, to be thence towed by another approved by them to Galveston, for the specific, known purpose of general overhauling and changing her engines. There is, additionally, the oral testimony which clearly shows that these surveyors were correct in their report and had competently functioned in making their recommendations and accepting the compliance by the owner, as per their certificate. The unwarranted assumption that the "Wash Gray" pulled apart, upon the contrary is argued in the brief of respondents is not sustained by the evidence. She did not pull apart in any particular. It is conclusively shown, and uncontradicted, that her forward bitts pulled loose because of the extraordinary straining and pounding under the stress of weather encountered. This was overcome, as the evidence shows, by the rigging of the Spanish windlass. The water which caused the sinking was shipped through her seams, from which the caulking had worked by the same cause. The only hope of overcoming this was by pumping, but pumping was inadequate. There is no evidence to show that this water leaked or entered the hull in any other way. While there is satisfactory evidence that the seas broke over the head of the little vessel, yet all the windows, doors, ports and other openings were planked or otherwise shut and made fast, except for one upper side entrance, through which the men climbed down into the boiler room. Several others were opened after the vessel was in actual danger to afford a means of saving the lives of the men as they made their last effort to save her after the towing stopped at about 11 p. m. The argument that the doctrine of res ipsa loquitur should be

684 applied, predicated on the erroneous and unwarranted assumption that the "Wash Gray" pulled apart, is without merit. It would indeed seem proper to apply it to the contrary. The fact that the vessel followed the ship well on the towing hawser and handled well through the evening and night of June 6, through the day and part of the night of June 7, when the weather became disturbed, and up to about 10 o'clock of that day, and then, though helpless, remained afloat intact and did not go down until after eleven o'clock of June 8, having gone something more than three hundred miles of a trip little more than four hundred miles speaks eloquently for a vessel of its size and type. Cases cited by respondents, where seagoing vessels encountered gales not extraordinary terrific, are eliminated from consideration upon the principle applied in the "Tornado" case.

The third and fourth contentions, predicated (1) upon the alleged release of liability clause in the contract of towage, i. e., that it was a fact material to the risk, unknown to and not disclosed to the underwriters, for which the policies were avoided; and (2) that the tug "Wash Gray" was negligently towed at too great speed, and that underwriters lost a right of recovery because of that release, may be considered together.

The release of liability in the towage contract was:

"Freeport Sulphur No. 1" will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. Freeport No. 1 is not responsible in any way for loss or damage to the "Wash Gray."

The rider-release clause of the policy is quoted in full as an excerpt therefrom supra.

A fair resolution of the evidence is in favor of libelant upon this feature of the case. A number of witnesses, familiar with towage contracts, having knowledge of the custom and practice from experience, testify that such clauses are usual and common, particularly in outside towage contracts between points on the Gulf of Mexico; that the tow carries its own risk always; that the tug never assumes the risk or hazard of loss or damage to the tow. Summed up, the conclusion upon it is that the tug undertaken no risk or hazard for the safety of the two; or, in other words, that the tug is not the insurer of the safety of the tow. Can it be
685 said that the clause complained of discharges the tug of its liability for any damage resulting from negligence or from its failure to exercise the due care and caution required of it by law? Clearly there is no declaration in this clause indicating a release such as would deprive the tow of its ordinary right of action of any damages it might have for negligent acts of omission or commission by the "Freeport Sulphur No. 1." The evidence satisfies me that such releases are very common, if not general, in towage contracts such as that under consideration; that the underwriters knew it, and if any did not, it was their business to know it. They did not inquire for a view of the contract. It is not clear that their brokers and agents did not know of the very terms of the towage contract, since it was stipulated as a conditions precedent to the underwriting that the specific steamship "Freeport Sulphur No. 1" and another later to be selected and approved by them or their agents was to do the towing, and all other specifications were minutely detailed for that operation at their behest. It is well settled as a matter of law that every contract of insurance is presumed to be made with knowledge of the customs and

practices of the trade in which the insurance is made. Renner vs. Bank of Columbia, 22 U. S. (9 Wheat) 581, 589.

Under the circumstances, if it were a fact that the loss or damage resulted from the negligence of the "Freeport Sulphur No. 1," such negligence being actionable, there is nothing in the release clause of the towage contract which might defeat such a cause of action. By its terms it does not pretend to release liability for loss or damage growing out of the tower's negligence. Such an intention would be defeated by the very obscurity of its terms. Such an agreement to release liability would have to be clearly established before a Court would give effect to it. The defender, 208 Fed. 836. Whilst the policy of the law has not imposed on the towing boat the liability of a common carrier, it does require of it the exercise of reasonable care, caution and maritime skill. Neglect of these, resulting in loss, damage or disaster, is actionable. The Syracuse, 79 U. S. (12 Wall) 167. As no right of action ex-
686 isted in favor of libelant, independent of the terms of the towing contract, nothing was lost or could be by respondent because of it. But, say the respondents, the tug was lost, if not because she was unseaworthy and fell apart, because, being seaworthy, she was towed at too great speed, at nine miles per hour, and was negligently pulled apart by the towing boat, because of which, except for the release clause in the towing contract, they would have a right of action for damages by subrogation.

This part of the contention is practically disposed of by what has gone before. If it were true that the loss was due to such negligent towing and such a right of action had therefore accrued, it would not, or at least it is extremely doubtful that it would be defeated by the

clause complained of. This, however, is purely a moot question. The evidence discloses no such negligence. The speed of the "Wash Gray" under its own power was shown to have been from ten to twelve miles per hour. She was towed at an average of about nine miles per hour, following nicely and handling well, unstrained and unhurt for the greater part, or three-fourths of the voyage. The respondents, with no evidence to sustain them argue upon a theory that this speed should have been reduced after the sea became rough. The evidence satisfied me that the master and officers of the towing ship exercised their best judgment; that the steady speed of about nine miles became necessary to keep the tow lines taut, so as to avoid having the towed vessel sheer to one side or the other, get into the trough of a sea, be thus tripped and turned over. Opposed to this there is no evidence to show that this desirable result could have been achieved at lesser speed, or that the master of the towing vessel erred in his judgment in maintaining that speed. There is certainly nothing to justify the unwarranted assumption by respondent that the vessel was pulled apart by excessive speed in towing, upon which their theory is predicated, as hereinbefore recited.

There will, therefore, be a decree in each of these eleven cases for libelants, with interest and costs.

(Sgd.) LOUIS H. BURNS,
Judge.

New Orleans, La., July 8, 1926.

687 DECREE.

Filed July 10, 1926.

(Title Omitted.)

This cause came on to be heard at a former date upon the pleadings and proofs submitted by and offered on behalf of the respective parties and was argued by the proctors for the parties in interest and submitted when the Court took time to consider.

Upon due consideration thereof, and for the reasons assigned in writing and on file herein;

It is ordered, adjudged and decreed that the libelant herein, the Companhia de Navegacion Interior S. A., do have and recover of and from the Fireman's Fund Insurance Company, Incorporated, respondents herein, the sum of ten thousand dollars ($10,000.00) with five per-cent per annum interest thereon from the twentieth day of July, 1922, until paid, together with all costs of Court.

(Signed) LOUIS H. BURNS.
Judge.

Decree rendered July 10, 1926.

Decree signed July 10, 1926.

688 PETITTION FOR APPEAL AND ORDER.

Filed July 23, 1926.

(Title Omitted.)

To the Honorable the Judge of the District Court of the United States for the Eastern District of Louisiana:

The petition of the Fireman's Fund Insurance Company, respondent herein, respectfully represents:

That petitioner is aggrieved by the judgment and decree herein rendered and signed on the 10th day of July, 1926, in favor of libelants and against the said respondent; that there are errors therein to the manifest prejudice and injury of petitioner; and that petitioner for the reasons specified in the assignments of errors filed herewith and made part hereof and for purposes of identification marked "Assignment of Errors," desires to appeal from said decree, and desires that said appeal, returnable to the Circuit Court of Appeal for the Fifth Circuit, shall operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of said decree.

Wherefore petitioner prays that said appeal may be allowed, and that upon petitioner giving bond in an amount to be fixed by the Court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said decree; that said appeal be made returnable to the United States Circuit Court of Appeal for the Fifth Circuit according to law; that the appellee may be duly cited to answer the appeal; and that a transcript of the records, pro-

ceedings, papers and exhibits upon which the said decree was rendered, duly authenticated, be sent to the said Circuit Court of Appeals. And petitioner prays for all general and equitable relief.

(Signed) DART & DART,
(Signed) ANDREWS, STREETMAN, LOGUE & MOBLEY,
(Signed) BIGHAM, ENGLAR & JONES.
Proctors for Respondent.
Proctors for Petitioner.

689 United States of America,
State of Louisiana,
City of New Orleans.

Before me, the undersigned authority, personally came and appeared: Henry P. Dart, Jr., who being duly sworn, deposes and says: That he is a member of the law firm of Dart and Dart, proctors for the petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief, and that the said petition is not taken for the purpose of delay, but because the petitioner believes that injustice has been done.

(Sig.) HENRY P. DART, JR.

Sworn to and subscribed before me this 16th day of July, 1926.

(Sig.) JOHN DART,
Notary Public.

ORDER.

Let an appeal be granted the above named petitioner to operate as a supersedeas upon petitioner furnishing bond in the sum of Fifteen Thousand Dollars ($15,000.00), with good and solvent surety, conditioned as the law directs, said appeal to be returnable to the United States Circuit Court of Appeal for the Fifth Circuit within thirty days from the date of this order.

New Orleans, Louisiana, July 19th, 1926.

(Sig.) LOUIS H. BURNS,
Judge.

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690 ASSIGNMENT OF ERRORS.

Filed July 23, 1926.

(Title Omitted.)

Assignment of Errors.

The respondent, Fireman's Fund Insurance Co., hereby assigns error to the proceedings and decree of the District Court in the above entitled action, as follows:

First: The District Court erred in rendering judgment in favor of libelant and against respondent in the sum of $10,000.00 with interest and costs.

Second: The District Court erred in failing to enter a decree in favor of respondent dismissing the libel at libelant's costs.

Third: The District Court erred in finding that libelants have amply sustained the burden of proving that the sinking and loss of the "Wash Gray" was caused by a peril insured against.

Fourth: The District Court erred in holding that the "proximate and efficient cause of the loss was due to the extraordinary condition of the weather and sea, the unusual peril, irresistible force, or overwhelming power constituting the peril insured by the contract."

Fifth: The District Court erred in holding that the "assumption that the 'Wash Gray' pulled apart" is not sustained by the evidence.

Sixth: The District Court erred in holding that "she did not pull apart in any particular" and that "it is conclusively shown and uncontradicted that her forward bitts pulled loose because of the extraordinary straining and pounding under the stress of weather encountered."

691 Seventh: The District Court erred in holding that "the argument that the doctrine of res ipsa loquitur should be applied predicated on the erroneous and unwarranted assumption that the 'Wash Gray' pulled apart is without merit."

Eighth: The District Court erred in finding as a fact that "the wind reached some twenty-five miles, with occasional puffs or gusts of greater velocity." The uncontradicted testimony in the record is that the velocity of twenty-five miles was the maximum velocity encountered in puffs or at any other time during the voyage.

Ninth: The District Court erred in finding that part of the voyage was completed in extraordinary weather and sea conditions." There is not a scintilla of evidence in the record that any extraordinary weather or sea conditions were encountered at any time during the voyage.

Tenth: The District Court erred in finding that the oral testimony "convincingly shows that for the 'Wash Gray' in the open Gulf, the wind and conditions of the sea were extremely perilous," and in concluding therefrom that the loss was caused by a peril of the sea." Even in a perfect calm, the open Gulf would be "extremely perilous" for a vessel which was unseaworthy because of insufficient caulking or insufficient towing bitts but her loss under these conditions would not be due to a peril of the sea.

Eleventh: The District Court erred in finding that "the water which caused the sinking was shipped through her seams, from which the caulking had worked by the same cause" and that there is no evidence to show that the water leaked into or entered the hull in any other way.

Twelfth: The District Court erred in not holding that "Wash Gray" sank without any evidence of a peril of the sea, but because of unseaworthiness or improper towage, neither of which are perils insured against.

Thirteenth: The District Court erred in holding that the existence in the towage contract of the release clause releasing the S. S. "Freeport Sulphur No. 1" from responsibilty for loss or damage to the "Wash Gray" was not a fact material to the risk and that libelants were under no duty to disclose it to the insurers.

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Fourteenth: The District Court erred in holding that "the evidence satisfies me that such releases are very common, if not general in towing contracts such as that under consideration; that the underwriters knew it, and if any did not, it was their business to know it."

Fifteenth: The District Court erred in finding that "it is not clear that their brokers and agents did not know of the very terms of the towage contract," because in the first place the Court apparently confuses the position of the broker who placed the insurance on behalf of the libelants and regards him as the agent of the underwriters instead of the agent of the insured, and secondly, the broker testified that the whole transaction was handled between him and the underwriters and that he did not know anything about the terms of the towage contract and therefore could not have disclosed them to the underwriters.

Sixteenth: The District Court erred in holding that "under the circumstances, if it were a fact that the loss or damage resulted from the negligence of the 'Freeport Sulphur No. 1,' such negligence being actionable, there is nothing in the release clause of the towage contract which might defeat such a cause of action."

Seventeenth: The District Court erred in holding that "as no right of action existed in favor of libelant independent of the terms of the towage contract, nothing was lost or could be by respondent because of it."

Eighteenth: The District Court erred in holding that "if it were true that the loss was due to such negligent towing and such a right of action had therefore accrued,

693 the evidence disclosed no such negligence and that the evidence on the contrary shows that the master and officers of the towing ship exercised their best judgment, that the steady speed of about nine miles became necessary to keep the tow lines taut, so as to avoid having the vessel sheer from one side or the other, get into the trough of the sea, be thus tripped and turned over."

Nineteenth: The District Court erred in not holding that the towage contract between libelant and the owners of the "Freeport Sulphur No. 1," whereby the latter was released from liability, rendered the policies null and void.

Twentieth: The District Court erred in not holding that no custom, usage or waiver shall affect, control or void any condition of the policies and that the alleged custom relied upon by libelant insofar as the rights of respondent are concerned is irrelevant and immaterial.

Twenty-first: The District Court erred in finding that the towing contract "does not pretend to release liability for loss or damage growing out of the tower's negligence," because the towage contract expressly provides that the steamer "is not responsible in any way for loss or damage to the Wash Gray," and it is difficult to understand how the English language could be employed to express a broader exemption from liability.

Twenty-second: The District Court erred in not holding that libelant having by its contract with the owners of the towing vessel released, decreased, transferred or lost its right of recovery against the towing vessel which upon payment of the loss of respondents, would have in-

ured to the benefit of respondent but for such agreement or contract, thereby rendered the policies null and void.

694 Twenty-third: The District Court erred in following and adopting as the rule to be applied in this case, the erroneous doctrine of the "Tornado" case (2 Federal 2nd 137) namely that "the implied warranty of libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river, and the perils of the sea against which it was insured was such perils as would be extraordinary to a boat of its type."

Twenty-fourth: That the District Court erred in not finding that "Welsh Gray" was in fact unseaworthy, unfit and not sufficiently strong to withstand the ordinary conditions of wind and sea to be expected on a voyage across the Gulf from Tampico to Galveston.

Respectfully submitted.

(Sig.) DART & DART,
(Sig.) ANDREWS, STREETMAN, LOGUE & MOBLEY,
(Sig.) BIGHAM, ENGLAR & JONES,
Proctors for Respondent.

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695 APPEAL BOND.

Filed July 23, 1926.

Know all men by these presents, that we, Fireman's Fund Insurance Company, as principal, and Indemnity Insurance Company of North America, as surety, are

held and firmly bound unto The Compania de Navegacion, Interior, S. A., in the full and just sum of Fifteen Thousand and 00/100 ($15,000.00) dollars to be paid to the said The Compania de Navegacion, Interior, S. A., its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of July in the year of our Lord, one thousand nine hundred and twenty-six.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between The Compania de Navegacion, Interior, S. A., libelant, and Fireman's Fund Insurance Company, respondent, in suit No. 17,205 of the docket, a final decree was rendered against the said Fireman's Fund Insurance Company, in the sum of Ten Thousand ($10,000.00) Dollars with interest and costs and the said Fireman's Fund Insurance Company having obtained an order of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the final decree in the aforesaid suit, and a citation directed to the said The Compania de Navegacion, Interior, S. A., citing and admonishing it to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said Fireman's Fund Insurance Company shall prosecute said appeal to effect, and answer all damages

and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sgd.) FIREMAN'S FUND INSURANCE COMPANY,
(Seal) By DART & DART,
Their Proctors.

(Sgd.) INDEMNITY INSURANCE CO. OF NORTH AMERICA,
(Seal) By R. GOTTSCHALK,
Attorney-in-Fact.

Attest:

A. L. PONS,
(Seal) Attorney-in-Fact.

Sealed and delivered in presence of:
(Sgd.) M. G. GUERIN,
(Sgd.) H. L. SUARES.

Approved by:
(Sgd.) LOUIS H. BURNS,
Judge.

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696 STIPULATION.

Filed August 24, 1926.

(Title Omitted.)

Stipulation.

It is stipulated by and between proctors for the libelant and for respondent that the following exhibits shall be transmitted to the Court of Appeals for the Fifth Circuit and need not be copies in the transcript:

1. Log Book of Steamship "Freeport Sulphur No. 1."

2. Chart offered by respondent in connection with deposition of of Captain Haslund.

It is further stipulated and agreed that all the original insurance policies shall be transmitted in the original to the said Court of Appeals for the Fifth Circuit and shall also be copies in the transcripts of appeal; each transcript to contain, at least, Libel, Copy of Insurance Policy for each record, being part of the libel; answer; memoranda in each record that all testimony and opinion of Court is contained in suit entitled Fireman's Fund record, Judgment, petition and order of appeal, assignment of errors, bond for appeal, etc.

(Signed) JOHN D., M. A. & EDWIN H. GRACE,
Proctors for Libelant.

(Signed) DART AND DART,
Proctors for Respondent.

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697 PRAECIPE.

Filed August 13th, 1926.

(Title Omitted.)

Hon. Henry J. Carter,
Clerk of the U. S. District Court,
New Orleans, Louisiana.

Dear Sir:

You will please prepare transcript of the record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit under the appeal heretofore allowed by said Court and include in said transcript the following pleadings (proceedings and papers on file, to-wit:

1. Libel.

2. Answer.

3. Depositions and exhibits offered in evidence by libelant, namely:

(1) The depositions of C. A. Barbour, on original and re-call examinations, together with each and every one of the various exhibits offered in evidence during his said examinations; four letters from C. W. Jungen; signed survey reports of Vern Dyer, from W. J. Pulford; and James F. Taylor.

(2) Deposition of Charles E. Clarke.

(3) Deposition of J. C. Grant, together with each and every one of the various exhibits offered in evidence during his said examination; particularly copy of survey report attached to his said deposition marked Libelant 3, Exh. 6 15/23.

(4) Deposition of A. N. Peckham, together with such exhibits offered in evidence during his said examination.

(5) Deposition of Mr. Charles Drouet, together with tug boat tariff, marked "Libelant's Exhibit No. 2," attached to his deposition, and such other exhibits offered during his examination.

698 (6) Deposition of L. Mims and copy of towing contract.

(7) Deposition of William H. Young, taken on or about Oct. 17, 1923, and exhibits offered during said

examination, marked Libelant's Exhibit A 1, A 2, A 3, A 4, A 5; receipt for registered letter, return receipt for delivery of same letter. So, also, deposition of said Wm. H. Young, on re-call for Libelant, taken May 4, 1926.

(8) Deposition of James P. Roney.

(9) Deposition of Henry A. Adams.

(10) Deposition of Lester F. Alexander.

(11) Deposition of R. D. Reeves, together with extract from book published in England covering certain English harbors showing custom in re non-liability of towing vessel for any loss or damage to tow.

(12) Depositions of Leoncia Carbajal, A. Romero, Verne Dyer, Jesse C. Barbour, Fred Franz, Max Winfield, all taken under commission herein before the U. S. Consul at Tampico; and offer in evidence, also, each and every one of the papers, exhibits and documents attached to said respective depositions, particularly, affidavit signed by C. G. Haslund, Charles McCanley, Aug. 18, 1922; affidavit signed by C. G. Haslund, September 27, 1922. The sworn declaration of the officers and other members of the crew of the Wash Gray, before the United States Consul at Tampico, Mex., June 20, 1922, at the request of Mr. James F. Taylor, Agent of the Insurance Company, the United States Salvage Association and answering the interrogatory of said Mr. Taylor, in effect an extended marine protest; together with certificate of the Vice Consul of the U. S., to the authenticity of said document; preliminary protest made by the Master of the Wash Gray on June 10, 1922, at Freeport, Texas; sworn declaration of the Master on

August 22, 1922, before the U. S. Vice Consul at Tampico, Mexico; certified extract from the log of the Wash Gray in possession of the Inspector and Port Captain at Tampico, Mex.; telegrams from Verne Dyer and J. F. Taylor, under date May 11, 1922, and June 2, 1922; reports of survey made by James F. Taylor; report of survey, made by Verne Dyer; copy of contract for towage of Wash Gray.

(13) Deposition of Jesse C. Barbour on re-call.

(14) Deposition of John D. Grace, and the six letters produced during this examination, initialed by the stenographer—three from the Fireman's Fund Insurance Company; one from each of the following, Aetna Insurance Company, Hartford, Conn.; Carpenter & Baker, Agents for some of the defendant Companies; Wm. H. McGee & Co., Underwriters Agents for certain of defendants.

(14½) Deposition of Captain Joseph Walsh.

(15) The eleven separate distinct policies of insurance, issued severally—one each—by one of the following named defendants.

(a) Globe & Rutgers Fire Insurance Co., No. 392732.

699 (b) Aetna Insurance Co., Hartford, Conn., No. 16032.

(c) The Franklin Fire Insurance Co. of Philadelphia, Pa., No. 2965.

(d) Fireman's Fund Insurance Co. of San Francisco, Calif., No. 15567.

(e) Hartford Fire Insurance Co., Hartford, Conn., No. 3080.

(f) Northwestern Fire & Marine Ins. Co., Minneapolis, Minn., No. 3097.

(g) National Liberty Insurance Co. of America, No. 205/558.

(h) The Liverpool and London and Globe Insurance Co., Limited, No. 2147/3876.

(i) The Phoenix Insurance Co. of Hartford, Conn., No. 2421.

(j) The Western Assurance Company, No. 21609.

(k) Springfield Fire & Marine Insurance Co., No. 458.

All defendants in the above entitled and numbered causes.

(16) United States Government Charts in relation to the Gulf of Mexico.

(17) Chart marked by Master of the S. S. "Freeport Sulphur No. 1," on chart of U. S. Weather Bureau.

(18) Rowland Linfield—called by respondent.

(19) Deposition of A. A. Grant.

(20) Respondents' and Libelants' rules to show cause on April 26, 1926; answer to rule, note of evidence on submission of rules all exhibits attached to rules and note of evidence and minute entries thereon.

4. Depositions and exhibits offered in evidence by respondent, namely:

(1) Depositions of officers of S. S. "Freeport Sulphur No. 1" taken in Galveston on July 29th, 1924, and exhibits identified by said witnesses, namely:

(a) C. G. Haslund, master.

(b) E. C. Marshal, chief officer.

(c) Nello Viacava, first assistant engineer.

(d) Log of S. S. "Freeport Sulphur No. 1."

(2) Depositions of insurance brokers and representatives taken in New York on May 10th, 1926, and exhibits identified by said witnesses, namely:

(a) William H. Young, broker for libelants.

(b) Reginald L. Billin, assistant manager of Vessel Agency Inc.

(c) T. Catesby Jones of Bigham, Englar & Jones.

(d) Harry P. Winters of Carpinter & Baker.

(e) John Joseph Barghusen of William H. McGee & Company.

(f) Edward B. Bannister of Globe & Rutgers Fire Insurance Company.

(g) Charles Rosebrock of Talbot, Bird & Co.

(h) Binder, respondents exhibit 1.

(i) Copy of Hartford Fire Ins. Co. policy, respondents exhibit 2.

(j) Copy of Northwestern Fire & Marine Ins. Co. policy, respondents exhibit 3.

(k) Letter dated Nov. 7, 1922, from John D. Grace to T. Catesby Jones, respondent exhibit 4.

(l) Copy of letter from T. Catesby Jones to John D. Grace, respondent exhibit 5.

700 (3) Depositions of witnesses taken in Mobile on May 20th, 1926, namely:

(a) Neander Cunningham.

(b) Thomas C. Thompson.

(c) Jake H. Jones.

(d) J. G. Murphy.

(e) Leslie Bodden.

(f) L. A. Scott.

(4) Depositions taken in New Orleans on May 19th, 1926, to-wit:

(a) Rowland Linnfield, of American Bureau of Shipping.

(5) Stipulation regarding testimony of Charles H. Page.

5. Opinion of the Court.

6. Final decree.

7. Petition for appeal and order allowing appeal.

8. Assignment of Errors.

9. Appeal bond.

10. Citation and return thereon.

11. Clerk's certificate to transcript of appeal.

12. Praecipe for transcript of record.

said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

Dated at New Orleans, Louisiana, July 23rd, 1926.

(Signed) DART AND DART,
Proctors for Libelant.

The foregoing is satisfactory to Libelant.

(Signed) JOHN D., M. A., & EDWIN H. GRACE.

701 Clerk's Office:

I, HENRY J. CARTER, Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 700 pages, contain and form a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings (except certain exhibits transmitted in the original by stipulation) in the cause entitled The Compania De Navegacion, Interior, S. A., versus Fireman's Fund Insurance Company, No. 17,205 of the docket of this Court, as made up in accordance with praecipe for transcript, copied therein.

Witness, my hand and the seal of the said Court at the City of New Orleans, Louisiana, this 31st day of August, A. D. 1926.

H. J. CARTER, Clerk,

(Seal) By C. D. SHAW,

Chief Deputy Clerk.

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * * *

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 4926.

Appeal from the District Court for the Eastern District of Louisiana.

FIREMAN'S FUND INSURANCE CO.,
Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.,
Appellee.

AGREEMENT FOR SUPPLEMENTAL TRANSCRIPT.

It is hereby agreed by and between the undersigned that the Clerk of Court shall make a copy of the extended protest made by the Master of the "Wash Gray" before E. P. Hoefle, a notary public in and for Brazoria County, Texas, on the 10th day of June, A. D. 1922, copy of which together with certificate from Clerk of the District Court is hereto annexed and that it shall be filed and duly printed as a supplemental transcript to stand in place of the incomplete protest appearing at pages 58 and 59 of the original printed transcript.

That a notation in read [red] ink shall be made on the incomplete protest appearing in the original printed transcript to the effect that

"This protest is incomplete. See supplemental transcript for full and complete copy."

DART AND DART,
Proctors for Appellant.
JOHN D., M. A. & EDWIN H. GRACE,
Proctors for Appellee.

The United States of America.

The State of Texas,
City and Port of Freeport.

Be it remembered that on this 10th day of June, A. D. 1922, before me, the undersigned authority, personally appeared Leoncia Carbajal, Master of the Mexican Steam Tug "Wash Gray" of the burthen of 160.46 tons or thereabouts, who declares that he set sail in and with said vessel from Tampico, Mexico, on June 6th, 1922, in tow of the American SS. "Freeport Sulphur No. 1" crossing the bar at 5.45 p. m. destined for Galveston, Texas.

Weather fair. Everything went well until 8 p. m., June 7th, strong breeze developed and tug began pounding and some of the seams seemed to be opening; in the meantime the Engineer started the pumps.

At 10 p. m. the bits began to loosen and made a Spanish windlass to pull the bit back in place. At this time I sent the Mate down into the hold who reported that the Tug was making considerable water.

At 11.30 p. m. the water in the Tug rolled to the bow causing Tug to go down by the head and seemed not to want to come up and I ordered the tow line cut to save the tug. As soon as line was cut her head came up and the boat righted herself. Before cutting the line we signalled the Freeport Sulphur No. 1 to stop. In about 15 minutes the SS. Freeport Sulphur No. 1 came alongside to ascertain the trouble and I told the Master of the Freeport No. 1 that the Tug was making water and would not stand further pulling. All the pumps were working while I was talking to the Captain of F. S. No. 1, but the water was gaining, the night looked bad and at 2.45 a. m. I asked the Captain of No. 1 to take us off as we were fearful of losing our lives. The "F. S.

No. 1" stood by until daylight. At daylight the Captain of "F. S. No. 1" sent his First Mate and Chief Engineer with six men on board the "Wash Gray" to ascertain condition and do what they could to save her. They found plenty of fuel oil but no water in the boiler. Then the "F. S. No. 1" put hose over and filled the boiler. The men then cut wood from the house to build fire under the boiler. While the Chief Engineer of the "F. S. No. 1" was trying to get up steam the others were pumping water out with hand pumps but could not pump fast enough to keep water down and suddenly the water put the fire out. As this time the Captain of "F. S. No. 1" asked the Chief how he was progressing and the Chief replied that the fires were out and that there was no use trying any further and that they had better leave the tug. After all men were aboard the "F. S. No. 1" the Steamer proceeded under very slow speed about one mile per hour, this was 10 a. m. June 8th. At 10.30 a. m. the tug began to sink slowly and completely disappeared in a few minutes. Before the Tug sank the "F. S. No. 1" came to a complete standstill and as the Tug went down the Captain of SS. "F. S. No. 1" ordered hawser cut.

And premises considered the said Master of the Tug "Wash Gray" hereby gives notice of protesting and causing this note or minute of all and singular the

premises to be entered in this register, reserving unto himself the right to extend the same at any time or place.

(Signed) LEONCIA CARBAJAL,
Master of Mexican Tug, "Wash Gray."

Thus done and protested before me on this the 10th day of June, A. D. 1922.

(Signed) E. P. HOEFLE,
(Seal) Notary Public in and for Brazoria County, Texas.

Compania de Navegacion, Interior, S. A.,
vs. No. 17,205, (Admiralty)
Fireman's Fund Insurance Company.

Clerk's Office:

I, HENRY J. CARTER, Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the attached document to be a true and correct copy of the affidavit of Leoncio Carbajal, Master of the Mexican Tug "Wash Gray", on file and of record in this office;

In preparing the transcript of record on the appeal taken in the above entitled and numbered cause, a copy of said document was included therein, in an incorrect form, a certain paragraph having been omitted from said copy;

This certificate and copy is furnished counsel for the respective parties, to be used in the United States Circuit Court of Appeals for the Fifth Circuit, and printed as a supplemental transcript.

Witness, my hand and the seal of said Court, at the City of New Orleans, Louisiana, this 24th day of March, A. D. 1927.

(Seal) H. J. CARTER, Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

JOINT MOTION AND ORDER CONSOLIDATING THIS CASE WITH CASES NOS. 4927 TO 4936, INCLUSIVE—Filed October 16th, 1926

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Honorable Louis H. Burns, Judge

No. 17205

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

FIREMAN'S FUND INSURANCE COMPANY

No. 17215

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

PHŒNIX INSURANCE COMPANY

No. 17206

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

GLOBE & RUTGERS FIRE INS. COMPANY

No. 17214

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

FRANKLIN FIRE INSURANCE COMPANY

No. 17213

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

SPRINGFIELD FIRE & MARINE INS. COMPANY

No. 17210

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

ÆTNA INSURANCE COMPANY

No. 17211

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

WESTERN ASSURANCE COMPANY

No. 17212

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

LONDON & LIVERPOOL & GLOBE INSURANCE CO.

No. 17209

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

NATIONAL LIBERTY INSURANCE COMPANY

No. 17208

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

HARTFORD INSURANCE COMPANY

No. 17207

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

NORTHWESTERN FIRE & MARINE INS. COMPANY

Consolidated for Trial, but Separate Judgment to be Entered in Each Case

Motion

On motion of Dart & Dart, proctors for the appellants, and John D., M. A. and Edwin H. Grace, proctors for the appellees in the above numbered and entitled causes and on suggesting to the Court that movers have stipulated and agreed, subject to the approval of the Court, that the transcript of appeal in only one of the above cases, to-wit, suit No. 17205 of the docket of the United States District Court, shall be printed, and that the transcripts in the other cases, to-wit, Nos. 17206 to 17215, shall not be printed until such time as the Court may consider it necessary, without prejudice to the rights of the parties and with the understanding that separate judgments shall be rendered in each of said cases, the object of said stipulation being to save the useless expenditure of costs, as will more fully appear from the stipulation aforesaid hereto annexed,

It is therefore ordered that the Clerk shall cause to be printed only one transcript, to-wit, the transcript of appeal in suit No. 17205, filed by the Fireman's Fund Insurance Company, and shall not have printed the transcript of appeal in the other ten cases, to-wit, Nos. 17206 to 17215, until such time as the Court hereafter may consider it necessary, provided, however, that all of the transcripts of appeal shall be filed and the cases docketed, and provided that separate judgments shall be rendered in each of the said causes.

October 16, 1926.

(Signed) R. W. Walker, Judge.

(Signed) Dart and Dart, Proctors for Appellants.
John D., M. A., & Edwin H. Grace, by (Signed) John D. Grace, Proctors for Appellees.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Honorable Louis H. Burns, Judge

No. 17205

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

FIREMAN'S FUND INSURANCE COMPANY

No. 17215

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

PHŒNIX INSURANCE COMPANY

No. 17206

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

GLOBE & RUTGERS FIRE INSURANCE COMPANY

No. 17214

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

FRANKLIN FIRE INSURANCE COMPANY

No. 17213

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

SPRINGFIELD FIRE & MARINE INS. COMPANY

No. 17210

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

AETNA INSURANCE COMPANY

No. 17211

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

WESTERN ASSURANCE COMPANY

No. 17212

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

LONDON & LIVERPOOL & GLOBE INS. COMPANY

No. 17209

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

NATIONAL LIBERTY INSURANCE COMPANY

No. 17208

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

HARTFORD INSURANCE COMPANY

No. 17207

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

vs.

NORTHWESTERN FIRE & MARINE INSURANCE CO.

Consolidated for Trial, but Separate Judgment to be Entered in each Cause

STIPULATION

Whereas, the respondents in the above numbered and entitled causes have taken an appeal from the decree of the District Court in each of the said causes and whose separate transcript of appeal have been filed with the clerk, and

Whereas, by stipulation, the parties have agreed that the evidence taken in the first of said causes, to-wit, No. 17205 of the docket of the United States District Court, shall be considered as having been taken in each of the other cases, as the issues involved in the other cases are the same as those presented by the first case, but that separate decrees shall be rendered in each of the cases, and

Whereas, all of the appeals in said cases will be determined on the evidence contained in the transcript in the first case, to-wit, No. 17205, and that there is no reason nor necessity for printing more than one transcript, to-wit, the transcript in No. 17205, and that the Court should direct the Clerk not to print the other ten transcripts, without prejudice, however, to the rights of the parties:

It is therefore, stipulated and agreed, that the parties hereto will join in a request to the court to order the clerk to have printed only one transcript, to-wit, transcript in suit No. 17205, and not to print the other ten transcripts, to-wit, Nos. 17206 to 17215, both inclusive, until such time as the Court may consider it necessary; and with the understanding that separate judgments shall be rendered in each of the eleven cases and that the rights of the appellees shall not be affected in any way, the object of this stipulation being to save the unnecessary expenditure of costs which would result from printing the ten transcripts aforesaid.

Dated at New Orleans, La., Sept. 22nd, 1926.

(Signed) Dart and Dart, Proctors for Appellants.
John D., M. A., & Edwin H. Grace, Proctors for Appellees.

No. 4926

FIREMAN'S FUND INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 29th, 1927

On this day this cause was called, and, after argument by T. Catesby Jones, Esq., and Henry P. Dart, Jr., Esq.,

for appellant, and John D. Grace, Esq., for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4926

FIREMAN'S FUND INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

Appeal from the District Court of the United States for the Eastern District of Louisiana

Henry P. Dart, Jr., Robert H. Kelley, T. Catesby Jones, (Dart & Dart; Andrews, Streetman, Logue & Mobley; Bigham, Englar & Jones on the brief), for Appellant.

John D. Grace, M. A. Grace, Edwin H. Grace, for Appellee.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed May 20th, 1927

BRYAN, Circuit Judge:

Appellee brought a libel in personam on a policy of marine insurance issued by appellant. The policy insured to the extent of $10,000, appellee's steam tug Wash Gray against loss by perils of the sea. It expressly excepted claims arising from unseaworthiness. The suit was defended on the grounds, among others, that the loss, which was admitted, was not caused by a peril of the sea, but either by unseaworthiness or by negligent towing. The Wash Gray had a length of 87 feet, beam 19 feet, depth 9 feet, and a tonnage of 105.25 gross tons. She had been engaged in river service near Tampico, Mexico. In May of 1922 appellee, her owner, being desirous of sending her to Galveston, to be over-hauled and repaired, made application for marine insurance in the sum of $85,000, covering

a voyage in tow in the Gulf of Mexico from Tampico to Galveston, a distance of about 420 miles. Representatives of several underwriters made their own examination, and, after their recommendations had been complied with, accepted the report of two marine surveyors to the effect that the tug appeared to be seaworthy and capable of withstanding a trip in tow to Galveston; and issued separate policies for varying amounts that in the aggregate made up the total amount of insurance applied for by appellee. The policies required the Wash Gray to be manned by a master and crew for emergency and to keep up steam in her pumps, and provided that the towing should be done by the steamer Freeport Sulphur No. 1 as far as Freeport, Texas, and by an approved tug from Freeport to Galveston. The Freeport Sulphur No. 1 was 309 feet in length, with a beam of 45 feet, gross tonnage of 2588.66, and displacement of about 3,000 tons. She left Tampico on a regular trip for Freeport at 6 p. m. on June 6, 1922, with the Wash Gray, manned as required, in tow. At the beginning of the voyage, the weather was clear, with a light easterly breeze; and the sea was smooth. These conditions of weather and sea continued unchanged, except that by next morning the weather was partly cloudy, until the afternoon of the 7th, when there were frequent showers accompanied by puffs of wind, and a small swell.

By eight o'clock that night a moderate northeast breeze was blowing against the current, and as a consequence the sea became choppy. A speed of nine miles an hour had been maintained from the beginning of the voyage, and the strong current increased that rate of speed through the water in the choppy sea to 10½ miles an hour. As soon as the Wash Gray encountered the choppy sea, she began to roll and pitch, but she gave no signal of distress until 11:30 p. m., or 3½ hours later. In the meantime speed was not slackened, and the rolling and pitching continued. At 10 p. m. it was discovered that the towing bitts of the Wash Gray were working loose, and that she had shipped considerable water. An attempt was made to pull the bitts back in place by a Spanish windlass, but by 11:30 p. m. enough sea-water had entered through her seams to force her down by the head; and then a signal of distress was given, and the hawser was cut. The Freeport Sulphur

No. 1 came alongside and remained until daylight, and then, after unsuccessful efforts to pump the water out, proceeded to tow at slow speed until 11:12 on the morning of the 8th, at which time the tug sank and became a total loss. There was some dispute as to the length of the hawser, but the weight of the evidence seems to support the conclusion of the district judge that it was approximately 300 feet long. The conditions of wind and sea encountered were not unusual or different from those which reasonably were to be foreseen as ordinary incidents of the trip. At no time during the voyage did the wind exceed 25 miles an hour, or were the waves higher than four or five feet from trough to crest.

The district judge accompanied a decree for appellee with a written opinion in which he cited with approval the case of Klein v. Globe & Rutgers Fire Ins. Co., 2 F. (2) 137, and stated that in his view "the implied warranty of the contract was that the Wash Gray was a seaworthy inland water vessel, and was able to withstand all ordinary perils of navigation upon such water, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its size and type." On the facts he found that the loss was caused by the conditions of the weather and sea, and that these conditions were extraordinary for appellee's tug.

He rejected appellant's contention that negligent towing was the cause of loss, saying, "both the towing ship, its officers and crew, and the crew of the little tug omitted nothing that good seamanship, skill and prudence would indicate."

In our view it is immaterial whether the loss of appellee's tug was attributable to negligent towing or to the choppy sea, and we accept the trial court's finding of fact that that loss was caused by the conditions of the weather and sea. Even so, in our opinion the loss was not caused by a peril of the sea, which was the risk insured against by the policy sued on. The conditions encountered at sea were not extraordinary or unusual, but were the ordinary usual and natural conditions that were to be expected. They were therefore not perils of the sea. Arnould on Marine Insurance, § 812; MacLachlan on Marine Shipping

(5 Ed.) 610; Carver on Carriage of Goods by Sea, § 86. In The Reeside, 20 Fed. Cases, No. 11,657, Mr. Justice Story said that the phrase, "danger of the seas," must "be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irrestible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." In Garrison v. Memphis Insurance Co., 19 How. 312, the Supreme Court cited that case with approval, and said: "These words (perils of the river) include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irrestible force or overwhelming power which no ordinary skill could anticipate or evade." In view of the just quoted authoritative and universally accepted definitions, we are of opinion that the phrase "perils of the sea," does not vary in meaning according to the size or type of vessel. The owner of a vessel impliedly warrants its seaworthiness. Any vessel, whatever its size or type, to be seaworthy, must be able to withstand the ordinary perils of a voyage at sea. Arnould, §686. A vessel is unseaworthy that does not measure up to this minimum requirement.

Assuming the correctness of the trial court's finding of facts in favor of appellee, the Wash Gray was lost because it was not staunch enough to withstand the ordinary action of the wind and waves; in short, because it was unseaworthy. As the policy of insurance expressly excepted the risk of unseaworthiness, there can be no recovery on that ground. Appellant made its own examination and survey, and thereby waived the implied warranty of seaworthiness. It could not thereafter contend that the policy was rendered void by reason of a breach of the warranty; but it still was entitled to defend a suit as to the cause of loss, and the burden still remained on appellee to prove that the loss was caused by a peril of the sea. New Orleans etc. Ry. Co. v. Union Marine Insurance Co., 286 F. 32.

There are degrees of seaworthiness, and sometimes the rates of premium are varied by the underwriters "according to the different estimate they form of the character and qualities of the vessels to which they relate." Orient

Marine Insurance Co. v. Wright, 23 How. 401. It is argued from this that there are corresponding degrees of perils of the sea. It is, of course, true that a given ship applying for insurance may be considered a better risk and better able to withstand even perils of the sea than another seaworthy ship. But that fact does not preclude the idea that both ships must be seaworthy.

Appellant also cites Joyce on Insurance, §2159, which, however, goes no further than to state that recovery cannot be defeated on the ground of the implied warranty of seaworthiness for a sea voyage where the insurer before assuming the risk knows the character and construction of the insured vessel. The case of Klein v. Globe & Rutgers Ins. Co., supra, relied on by the district judge in his opinion, and by appellee here, seems to sustain the position that what constitutes a peril of the sea is to be determined by the size or type of the insured vessel. Unless that case is distinguishable from this one by a difference in the risks insured against, by the probability that the loss of the vessel there insured was caused by striking a log in the river, or by the fact that the language relied on was used in connection with the extent of the implied warranty of seaworthiness, then that case does sustain the decree of the district court. It is true nevertheless that the language in that case that is relied on was employed in discussing the effect that should be given to the implied warranty of seaworthiness, and that it was held that the evidence strongly tended to show that the loss was due to a peril of the river and not to unseaworthiness. Appellee also relies on Farmers' Feed Co. v. Insurance Co., 162 F. 379, decided by the district court for the Southern District of New York, and affirmed by the Circuit Court of Appeals, 166 F. 111; and on Thebaud v. Great Western Insurance Co., 155 N. Y. 516. Recovery was allowed in each of those cases on the actual contract which was held to be different from the contract evidenced by the insurance policy. It was merely held that effect should be given to the actual contract. The facts in this case do not warrant the conclusion that appellant bound itself by its conduct or by any agreement to accept the risk of unseaworthiness.

The decree of the district court is reversed, and the cause remanded with directions to dismiss the libel.

No. 4926

FIREMAN'S FUND INSURANCE COMPANY
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A.

JUDGMENT

Extract from the Minutes of May 20th, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to dismiss the libel;

It is further ordered, adjudged and decreed that the appellee, Compania de Navegacion, Interior, S. A., be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

OPINION OF THE COURT—Filed May 20th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4927

GLOBE & RUTGERS FIRE INSURANCE COMPANY, Appellant,
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4928

NORTHWESTERN FIRE & MARINE INSURANCE COMPANY, Appellant,
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4929

HARTFORD FIRE INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4930

NATIONAL LIBERTY INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4931

ÆTNA INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4932

WESTERN ASSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4933

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4934

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4935

FRANKLIN FIRE INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

No. 4936

PHŒNIX INSURANCE COMPANY, Appellant,

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

Appeals from the District Court of the United States for the Eastern District of Louisiana

Henry P. Dart, Jr., Robt. H. Kelley, T. Catesby Jones, (Dart & Dart, Andrews, Streetman, Logue & Mobley; Bigham, Englar & Jones on the brief), for Appellants.

John D. Grace, M. A. Grace, Edwin H. Grace for Appellees.

Before Walker, Bryan, and Foster, Circuit Judges

BRYAN, Circuit Judge:

It was stipulated by counsel that the above cases should abide the result of the appeal in Fireman's Fund Insurance Company v. Compania de Navegacion, Interior, S. A., No. 4926, this day decided and reversed. Accordingly, the decrees herein are reversed, and the causes remanded with directions to dismiss the libels.

No. 4926

FIREMAN'S FUND INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4927

GLOBE & RUTGERS FIRE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4928

NORTHWESTERN FIRE & MARINE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4929

HARTFORD FIRE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

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LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.,
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4934

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4935

FRANKLIN FIRE INSURANCE COMPANY
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4936

PHŒNIX INSURANCE COMPANY
versus
COMPANIA DE NAVEGACION, INTERIOR, S. A.

MOTION AND ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

Extract from the Minutes of June 8th, 1927

Upon motion of Compania de Navegacion, Interior, S. A., appellee in the above entitled and numbered cause by and through its proctors John D., M. A., & Edwin H. Grace, and

Upon suggesting to the Court that appellee in each of the above entitled causes desires to present therein a petition for a rehearing and will require an extension of fifteen days from the tenth day of June, 1927, within which to present said application, it is

Ordered, that the above named appellee be and it is hereby granted an extension of fifteen days from the tenth day of June, 1927, within which to present in the above causes an application for a rehearing.

(Signed) Rufus E. Foster, Judge.

New Orleans, La., June 8, 1927.

PETITION FOR REHEARING—Filed June 24th, 1927

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. 4926

FIREMAN'S FUND INSURANCE COMPANY

(of San Francisco, California),

Appellant,

versus

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Appellee.

CONSOLIDATED WITH FOLLOWING ALLIED APPEALS:

1. Globe & Rutgers Fire Insurance Co. of New York ..... No. 4927
2. Norwestern Fire & Marine Ins. Co. of Minneapolis, Minn. ..... No. 4928
3. Hartford Fire Insurance Co. of America, of New York ..... No. 4929
4. National Liberty Insurance Co. of America, of New York ..... No. 4930
5. Aetna Insurance Co. of Hartford, Conn..... No. 4931
6. Western Assurance Co. of Toronto, Canada.. No. 4932

7. Liverpool & London & Globe Ins. Co., of London, England ..... No. 4933
8. Springfield Fire & Marine Insurance Co. of Springfield, Mass. ..... No. 4934
9. Franklin Insurance Co. of Philadelphia .... No. 4935
10. Phoenix Insurance Co. of Hartford, Conn. .. No. 4936

FOREWORD.

Each one of the above named eleven appellants underwrote a part of the total insurance effected on the inland water tug "Wash Gray," involved in this cause; each filed a separate appeal from the judgment of the United States District Court for the Eastern District of Louisiana. The said eleven appeals were all submitted together on the one state of facts, on original hearing, for the judgment of this Honorable Court; and were all determined together, so that this application for a rehearing is made in the case of each one of the said eleven appeals.

PETITION FOR REHEARING.

To the Honorables the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The Compania de Navegacion, Interior, S. A., appellees in the above eleven entitled and numbered causes, pray this Honorable Court will reconsider and rehear the matters decided by this Honorable Court on the 20th day

of May, 1927, and to make such order or orders as may be necessary to the end that this Honorable Court will set aside its judgment herein and affirm the judgments of the lower Court in each of said causes, on the following grounds:

First: That this Honorable Court, in reversing the District Court, in its determination of the meaning in law of the terms "perils of the sea" and "seaworthy," as used in policies of marine insurance as applied to vessels constructed and designed for inland water navigation when towed from one seaport to another along the coast or out on the sea or Gulf of Mexico, is therein squarely and most positively directly in conflict with United States Circuit Courts of Appeals for the Second and Third Circuits, which said Appellate Courts were followed by the District Court herein; and your Honors are also directly at variance with leading Courts of last resort in different States of the United States, as hereinafter shown, and, still further, your Honors are holding directly, as also hereinafter shown, against leading American and English writers on the law of insurance. Hence, we most earnestly petition the Court for a rehearing, in the interest of a uniform jurisprudence in this great vital system of law of insurance, especially in view of what was said by the Supreme Court of the United States in the case of *Peters v. Warren Insurance Co., 14 Pet., 99, 108, 10 L. Ed., 371, to-wit:*

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the

> exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

And what was said by Lord Chief J. Lee, in *Kelly v. Royal Exchange Insurance Co., 1 Burr., 349*, that these policies of insurance,

> "are to be construed largely for the benefit of trade, and for the insured."

Second: Among the various defendants herein are some underwriting companies domiciled in New York, where the rule laid down by the Circuit Court of Appeals for the Second Circuit must prevail. There are other underwriters directly concerned herein as defendant domiciled in Pennsylvania, where the rule of law laid down in the Third Circuit must prevail. There are English and Canadian companies also defendants herein accustomed to the English rule of law. With all of which this Honorable Court is directly in conflict, and by one fell swoop your Honors are wiping out in this Circuit a right of recovery allowed in other Circuits for loss of inland-water vessels, lost in tow while being taken out of one seaport to another seaport along the coast or over ocean or gulf waters, where such inland-water vessels are made as seaworthy as vessels of that type and construction could reasonably be made so. That in both the Second and Third Circuits, the Appellate Courts affirmed the District Courts on the above point, with

which decisions the District Court for this District is in accord—aggregating nine Federal Judges; with whom your Honors hold directly contrary to their finding of the law.

Under the ruling of this Honorable Court it will not be possible to recover on any policy of insurance of an inland-water vessel towed from seaport to seaport, notwithstanding how high the rate of premium may be that the so-called assured shall pay, for it is not possible to put such a vessel in a condition which will enable it to resist that condition of the sea, which, while presenting what may be termed ordinary perils of the sea to a large ocean going vessel, of 3000, 5000 or 10,000 tons, or more, will present extraordinary conditions with respect to an inland-water vessel not designed for sea navigation, although made as seaworthy as her size and type will reasonably permit; and we respectfully submit that such a rule of law is entirely in conflict with the long settled law as proclaimed in English and American Courts and as declared by English and American writers. In effect, **your Honors are holding that such policies are void**—void *ab initio.*

Third: The District Court (Tr., p. 15), in stating its understanding of ordinary perils of the sea, and seaworthiness of inland-water vessels towed out on the gulf or sea, says:

> "Taking up the contention made as stated, the first makes direct issue with the libellant's contention as to the meaning of the term peril of the sea. Upon this point I am fully persuaded by

> the carefully considered opinion in the 'Tornado' case (Klein v. Globe & Rutgers Fire Ins. Co., 2 Fed., 2nd, 137, U. S. Circuit Court of Appeals, 3rd Circuit), cited and briefly quoted *supra*, and conclude that the implied warranty of the contract was that the 'Wash Gray' was a seaworthy inland water vessel, and was able to withstanding all ordinary perils of navigation upon such water, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its size and type."

In reversing this cause on the foregoing point, a point which involves many millions of dollars every year, a most vital one for all owners of inland-water craft, which are towed from one seaport to another along the coast or on outside waters, this Honorable Court says:

> " * * * we are of opinion that the phrase 'perils of the sea' does not vary in meaning according to the size or type of vessel."

Whereas, on the other hand, the United States Circuit Court of Appeals decided directly to the contrary in affirming the District Court of the United States for the Western District of Pennsylvania, wherein that Court, in *The Tornado, 2 Fed. (2), 137*, says:

> **"What are the 'perils of the seas' contemplated in the policy?** In their excellent and exhaustive brief, counsel for the respondent have undertaken to answer the query by the citation of a number of cases wherein the term is defined. Nearly all, if not all, of those cases had as subject-

matter policies of insurance **upon sea-going vessels,** and while we adopt the underlying principles which led to the definitions, we cannot accept the literal definitions because of the variation between the underlying facts of the instant case and those of the cases cited. In arriving at the meaning of the terms in the present policy we must keep in mind the kind of boat insured, the voyage contemplated, and the nature of the risk assumed. The Tornado was an upper river steamboat, which, under the terms of the policy, was to be towed over the Mississippi below New Orleans and a part of the Gulf of Mexico, waters which it was not designed to regularly traverse. By the original terms of the policy the boat was to be taken to Tampico upon a sea-going barge, but a rider was added to the contract, at the instance of the respondent, by which this provision was changed, and the vessel was towed upon its own bottom. By the change the insurer assumed a greater risk, and the insured paid a higher premium. Under the circumstances it cannot be claimed that the libelant impliedly warranted the boat as seaworthy to the extent of being able to withstand all winds and waves in the lower river and the Gulf of Mexico, except such as were extraordinary. On the other hand, the contract, in our opinion, was not one of guaranty on the part of the respondent that the boat would safely make the voyage, as claimed by libelant. The implied warranty of the libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river, and **the 'perils of the sea' against which it was insured were such perils as would be extraordinary to a boat of its type."**

And therein stands an absolute irreconcilable conflict between this Honorable Court when it says, "we are of opinion that the phrase 'perils of the sea' does not vary in meaning according to the size or type of vessel," as against what is said hereinabove by the Circuit Court of Appeals for the Third Circuit.

The sole defendant in *Klein v. Globe & Rutgers Ins. Co., supra,* decided in the Third Circuit, is the heaviest underwriter of the eleven companies, insurers in the instant *Wash Gray* case, with irreconcilable decisions in these two cases.

Joyce, on the Law of Insurance, Volume 4, Section 2159, p. 3687 (with citation of authorities), cites the foregoing case in the Third Circuit, and others, as stating the law, and is directly in conflict with what your Honors have stated about the term "perils of the sea." This leading American writer on the law of insurance says:

> "2159. Different Degrees of Seaworthiness. That there are different degrees of seaworthiness dependent upon the character of the vessel, its construction, its navigation and service required, the length and nature of the voyage, the season of the year, its trade, and other factors, is clearly evidenced by the cases. Thus, a 'steamship' or vessel capable of being propelled by steam or sails must be seaworthy with reference to its character, service, and navigation required; she must be fully equipped, manned, and provisioned as a steamer and sailing vessel. A flatboat navigating the Mississippi must be seaworthy with reference to its

navigation and service required. So a voyage may require a different complement of men or state of equipment in different parts or stages; as in case of one down a canal or river and thence to the open sea. And the rule as to the nature of services required applies where only the ordinary perils of waters in or near a harbor instead of the ordinary perils of the sea are liable to be encountered. **If a vessel is built for river service and not for open sea navigation** and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea, cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the construction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea going vessels, so that the nature of the service for which she was intended is fully known to both parties."

And the record shows in this case in respect to the "Wash Gray," as testified to by Mr. Reginald H. Billin (R., 491), witness for all underwriters, that, as a matter of fact,

> "This insurance was placed subject to satisfactory inspection, we did not have inspection at that time, **but we had the approval of the surveyor before we issued the policy.**"

And testifying to the completeness of the information afforded by these surveyors, Mr. Billin further says (R., 492):

> Q. That would cover even more than any description you might have in your record?
>
> A. Yes, sir.
>
> Q. Because you have personal inspection by men of your own choice?
>
> A. That is right.

Nevertheless, this Honorable Court has found in favor of the underwriters on the alleged grounds of unseaworthiness of the "Wash Gray." This Honorable Court holding that:

> "We are of opinion that the phrase 'perils of the sea' does not vary in meaning according to the size or type of a vessel. The owner of a vessel implies warranty of seaworthiness. Any vessel, whatever its size or type, to be seaworthy must be able to withstand the ordinary perils of the sea. Arnould, Par. 686. A vessel is unseaworthy that does not measure up to this minimum requirement."

Although your Honors refer to Arnould, it is to a paragraph in this excellent work dealing with the subject in a general way, with citation of cases for ocean-going vessels. But here is what the same author says, when he comes to discuss that term with respect to different classes and types of vessels, **the very point involved in this case,** for instance:

Arnould on Marine Insurance, 10 Ed., Sec. 710, p. 920, Vol. 2, says:

> "Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means."

In *Marsden's Shipping and Marine Digest of English Cases, Second Edition, 1927,* it is said (par. 1783):

> "The seaworthiness, of which in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured. Clapham v. Langton, 34 L. J. Q. B., 46; 10 L. T., 875; 12 W. R., 1011—Ex. Ch. S. P., Burgess v. Wickham, 3 B. & S., 669; 33 L. J. Q. B., 17; 8 L. T., 47; 11 W. R., 992.
>
> "Therefore, on a policy 'on a voyage from the Tyne to Odessa,' it being shown that the vessel was an iron steamer of very light draught of water,

constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected, and the dimensions of the vessel then stated to them, and that (though it was impossible to make her fit to encounter the ordinary perils of ocean navigation) the ship had been made as seaworthy as her size and construction would admit; the underwriters were held liable on her being lost by the perils insured against. Ib."

And on page 1785:

"**Inland Vessel Used for Ocean:** When a vessel built for inland navigation is insured for an ocean voyage, there is an implied warranty that she shall be made as seaworthy for the voyage as such a vessel can be made by ordinary available means. Turnbull v. Janson, 36 L. T., 635; 3 Asp. M. C. 433—C. A."

In the instant case when the marine surveyors representing the defendant underwriters visited the "Wash Gray" for the purpose of determining what could be done with this type and size of vessel to make her seaworthy as far as such a vessel of that size and type could be made seaworthy. They required that certain work be done about the bitts of the vessel, directed that the windows, doors and hatches be planked up, required that a crew be placed on board to keep up steam on the vessel to meet any emergency that might happen, designated extra equipment to be carried, etc., and, thereafter, again visited the vessel and, finding that all their recommendations were carried out,

both surveyors did unqualifiedly approve the vessel as seaworthy for the voyage. All this is most decisively established and stands without contradiction. We submit that this went far beyond the requirements of the English cases and put the "Wash Gray" well within the terms thereof; so much so that the language of *Mr. Arnould* in his work *on the Law of Insurance*, above quoted from, was more than complied with, where he says that:

> "Again, the class of vessel may be such as to not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case."

Such, indeed, was the knowledge of the underwriters herein by and through their marine surveyors whose reports were in their hands before the policies were issued. Hence, this Court had no hesitancy in saying that the warranty of seaworthiness was waived.

It was because of the knowledge possessed by the underwriters of the condition of the barge in the case of *Farmers Feed Company v. Insurance Company of North America*, determined by the United States Circuit Court of Appeals for the Second Circuit, affirming the District Court for the Southern District of New York; and such was true, too, of the case of *Thebaud v. Great Western Insurance Co., 155 N. Y., 516, 50 N. E., 284*, wherein it was determined that

because of such knowledge and, in the face thereof, the issuance and delivery of their policies and collection of an extra high premium, the Courts declined to permit the underwriters to escape by pleading a loss by unseaworthiness, and not by a peril of the sea; and held them liable in each of the above cases. Your Honors are directly in conflict with said cases, holding to the contrary and releasing the underwriters.

The above referred to case of the *Farmers Feed Co. v. Insurance Co. of North America*, was brought directly on the contract of insurance, evidenced by the policy of insurance, just as in the *"Wash Gray"* case, and was not brought on any contract other than on the policy of insurance; hence, this Honorable Court is in error in assuming any other contract was before that Court. To make this perfectly clear to the Court we have filed with this petition for a rehearing a certified copy of the petition filed in that case together with the policy of insurance attached thereto, which was the sole contract sued upon. The evidence in that case is not near so strong as in this *"Wash Gray"* case, concerning the knowledge of the underwriters of the physical condition of the insured vessel relating to seaworthiness of the respective vessels. It could not be stronger than it is in the *"Wash Gray"* case.

The petition filed in the *Farmers Feed Co. v. Insurance Co. of North America (supra)*, appears in the appendix of this brief, and the policy attached thereto appears in the record.

The District Court for the Southern District of New York, affirmed by the Circuit Court of Appeals, held that the knowledge of the underwriters respecting the character, size and type of vessel and its condition overcame the requirement of seaworthiness stipulated for in the policy. So, in the instant case of the "Wash Gray," this Honorable Court finds that the warranty of seaworthiness in the policy was waived by their own examination of the "Wash Gray" by their own surveyors. So, too, the Second Circuit Court of Appeals held to same effect in the above case. But, in the "Wash Gray," your Honors are releasing underwriters, on the alleged grounds of unseaworthiness; the United States Circuit Court of Appeals for the Second Circuit did just the contrary, holding the underwriters liable, affirming the lower Court.

In the case above refrered to, affirmed in the Second Circuit, the District Court quotes at length from the leading case on this point, determined by the Court of Appeals for the State of New York, wherein the recognized rule is laid down, and the Circuit Court of Appeals, referring to that said quotation, says:

> "The facts bring the case within the rule of Thebaud v. Great Western Insurance Co., 155 N. Y., 516, 50 N. E., 284."

A lengthy abstract from that New York case, quoted repeatedly by Federal and State Courts throughout this

country and abroad, appears in the District Court decision *(162 Fed., 383)*. It reads as follows:

> "It is no doubt the general rule that in all contracts of marine insurance upon vessels there is an implied warranty that the subject of the insurance was at the time seaworthy, or in other words, reasonably fit and capable of making the voyage. But in this case both parties knew that the vessel was not intended for service upon the open sea. She was not built or constructed for any such purpose, but, on the contrary, for the river service. Before the defendant entered into the contract the plans and specifications with reference to the construction of the Dos Hermanos had been submitted to its agents. They put the defendant in possession of all information concerning the character and construction of the craft. The defendant's marine engineer, who had had considerable experience, assured the broker who took the risk 'that she was built for the river trade, and he did not consider that she was just the thing to attempt all weathers on the coast going around there, but if properly handled she might get there, provided she took the inland course so far as possible."
>
> * * * * *
>
> " * * * We can discover no reason why the general rule applicable to the risks in fire insurance policies does not apply to this case. As was said by this court in the case of Bidwell v. North Western Ins. Co., 24 N. Y., 302: 'Indeed it is not easy to perceive why an insurance company, by reason of the formal words of clauses (of a

general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud."

* * * * *

" * * * But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiving the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction, known to it at the time of taking the risk, would scarcely be consistent with commercial morality."

Going back to *Farmers Feed Co. v. Insurance Company of North America, 162 Fed., 383*, the District Court says:

"Strictly, she was not competent to resist the ordinary action of the waters she was required to navigate in and the respondent strongly urges that

> the claim should be rejected. If it were not for the knowledge the respondent had of the boat, there would be much to sustain the contention, but when it knowingly took the risk, at a high premium, I think it should be held to its bargain and not be permitted to resort to the terms of the policy to overcome the claim."

That is to say, the Court determined that to allow the underwriters to resort to the term in the policy in relation to the warranty of seaworthiness, notwithstanding their knowledge of the type and character of the vessel, would not be just, and, consequently, held them to its bargain—the policy of insurance—but with the stipulation therein respecting condition of seaworthiness rendered inoperative because of the personal knowledge of the underwriters of the material facts in respect thereto.

Fourth: Considering the authorities hereinbefore set out we here submit for the esteemed consideration of the Court, the perils of the sea which were extraordinary to the "Wash Gray's"—and would be so to any boat of her type, at the time she was lost.

(1) The wind having a velocity of twenty-five miles an hour blowing from a northerly direction, head on **against** the "Wash Gray," with the "Wash Gray" proceeding against that wind with her own velocity of about nine miles an hour, manifestly gave a wind effect of **thirty-four miles an hour against that tug.**

(2) The wind blowing at twenty-five miles an hour from a northerly direction and the current flowing from a southerly direction produced a choppy sea, with the waves running from four to five feet high. As both the current and the course of the "Wash Gray" were in approximately the same direction, the velocity of the current should not be added to the speed of the vessel to get her speed through the water, as is done by the Court.

(3) This sea and wind, without denial, caused the "Wash Gray" to **pitch** and **roll** and **pound** throughout approximately two hours, when, finally, her seams began opening up, and, later on, her bitts began to loosen so that she was ultimately rendered in such a leaky condition her officers were finally required to cut the tow line and call the towing ship to her side, but, with the continued inflow of water due to injuries sustained while **pitching, pounding** and **rolling,** she finally filled up, sank out of sight and became a total loss.

(4) Certainly it cannot be denied that her loss thus occasioned was by condition of the sea which was extraordinary to a boat of her type; so, manifestly, her loss comes within the rule laid down by the American Federal and State Courts and by the English Courts, and as set out in the leading American and English works, hereinbefore quoted from.

(5) The record shows, without denial, that irrespective of the size of the vessel, if she shall **pound on the**

water, roll and **pitch into the seas,** she will, in the case of a wooden vessel, spew out her oakum, rendering her seams leaky which, of course, may cause her to founder within a short time, and if an iron or steel vessel **pounding** and **pitching** will sheer their rivets causing them to leak through open rivet holes and slackened seams, causing them, too, to founder. The "Wash Gray" withstood this **pounding** and **pitching** for a period of some hours before it succeeded in spewing out her oakum and rendering her condition beyond saving.

(6) So, we respectfully submit the rule of law laid down in the other Circuits hereinbefore referred to, together with the other authorities, which hold that any vessel, be her size, type and character of construction what it may, which is lost at sea by reason of hours of **pounding on the waves, rolling and pitching into the waves,** is lost by reason of a peril of the sea, whether she be a ten thousand-ton vessel, or a ten-ton vessel. The underwriters, too, take care of their own interest in respect to these different vessels, because of the difference in degrees of seaworthiness, by adjusting their rates of premium to meet the particular degree of risks and hazards to which each particular type of vessel is exposed.

(7) With the "Wash Gray" having a draft of approximately five feet, and the waves running from four to five feet, it is manifest that while **pitching** and **pounding** and **rolling** in this choppy sea, she was experiencing relatively the same grave degree of perils of this sea, as to her, that

would be such to a steamship having a draft of thirty feet, if **pitching** and **pounding** and **rolling** in waves thirty feet high—approximately her draft.

It would seem only necessary to suggest this situation, to at once readily realize that there is every reason and common justice in holding that just as the underwriters measure the amount of premium which they should charge with respect to the manifest degrees of hazards vessels of different type, size and character will be exposed to, so, too, they should be held to answer for the damage or loss sustained to be determined in respect to those same size, type and character of vessels made as seaworthy as their physical structure size and type will permit.

We cannot believe that this Honorable Court will, in the last determination of this cause, stand alone against the authorities hereinbefore quoted from.

Wherefore, petitioners respectfully pray that this Honorable Court will consider the grounds hereinabove set out upon which a rehearing is asked to the end that this Honorable Court will direct and grant a rehearing in this case and thereon will affirm the judgment of the lower Court.

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE,
Proctors for Appellees.

CERTIFICATE.

I hereby certify that in my opinion the above and foregoing petition for a rehearing is well founded in law and that it is not filed for the purpose of delay.

JOHN D. GRACE.

EXHIBIT OFFERED BY APPELLEE—Filed June 24th, 1927

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 1st day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-seven, and of the Independence of the said United States the One Hundred and Fifty-First.

(Signed) Alex Gilchrist, Jr, Clerk. (Seal.)

To the Honorable the judges of the District Court of the United States for the Southern District of New York:

The libel of the Farmers' Feed Company of New York against The President and Directors of the Insurance Company of North America, in a cause of contract, civil and maritime, alleges as follows:

First. At the times hereinafter mentioned the libellant was, and still is, a domestic corporation, organized and existing under the laws of the State of New York, having an office in the City of New York within this District.

Second. The President and Directors of the Insurance Company of North America is the incorporated name and title of the respondent, which was at such times, and is now, an insurance company organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Philadelphia, and a branch office and agency in the City of New York.

Third. On or about the 30th day of April, 1906, at the City of New York, in consideration of a premium of $157.50, paid to it by the libellant, the respondent made its policy of insurance in writing, a copy of which is annexed hereto, marked "A", and hereby made a part of this libel, and thereby insured the libellant from 30th April, 1906 to 30th April 1907, upon all kinds of lawful goods and merchandise laden on board the good barge Lydia L. Mackey against the perils in said policy particularly described. In consideration of said premium, which greatly exceeded the usual rate, the respondent after inspecting said barge waived any warranty as to her condition.

Fourth. At all times during the continuance of said policy and until the loss hereinafter mentioned said barge Lydia L. Mackey was in all respects tight, staunch, strong, and seaworthy and fitted for the harbor business in which she was engaged.

Fifth. On or about the 1st day of September, 1906, said barge was laden with a cargo of brewers' dried grains, belonging to the libellant, consisting of two hundred and twenty-four tons, which was reasonably worth the sum of $4,327.32.

Sixth. On or about the 11th day of September, 1906, while said barge, containing said cargo, was navigating the harbor of New York, said barge by reason of the perils insured against, sank, and said cargo became water-soaked, wrecked, and totally lost.

Seventh. The libellant duly fulfilled all the conditions of said policy of insurance on its part to be performed, and pursuant to the terms of said policy duly filed proofs of loss, which were accepted by the respondent.

Eighth. By reason of the matters aforesaid there is now due and owing to the libellant from the respondent the sum of $5,134.37, including the cost of raising and removing said cargo, with interest on $4,327.32 thereof from the 14th day of October, 1906, and on $807.05 thereof from the 12th day of November, 1906, no part of which sum has been paid although payment thereof has been duly demanded.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellant prays that process in due form of law issue citing the said respondent to appear and answer all and singular the matters aforesaid, that the libellant be decreed the said sum with interest and costs, and for such other and further relief as the libellant may be entitled to receive.

Farmers Feed Company. Geo. E. Todd, President.

Southern District of New York,
City and County of New York, ss:

George E. Todd, being duly sworn, says that he is the President of the Farmer-' Feed Company of New York, which is a corporation wherefore deponent makes this verification; that he has read the foregoing libel and that the same is true to the best of his knowledge; that the sources of his information as to the matters stated therein are statements and reports made to him by employees of the libellant.

Geo. E. Todd.

Sworn to before me this 8th day of April, 1907. Albert C. Fuchs, Notary Public, No. 88, Kings Co. Certificate filed in N. Y. County. (Seal.)

Wing, Putnam & Burlingham, Proctors for libellant.
U. S. D. C., S. D. of N. Y., May 14 1907. O. K. J. S. C.

D 6. No. 67973. Amt. Ins., $4,500. Rate, 3½%. Premium, 157.50.

N. Y. Literage Policy

"A"

By the President and Directors of the Insurance Company of North America, Philadelphia

By This Policy of Insurance does insure Farmers Feed Co. of New York on account of whom it may concern loss, if

any, payable to them or order on cargo free of claim for damages but liable for the total loss of a part if amounting to 5 per cent upon all kinds of lawful goods and merchandise (but not to include entire cargoes of Coal, Cement, Sand, Earth or Rock), their own or for which they may be liable, laden on board the good Barge "Lydia L. Mackey" 30th April 1906 to 30th April 1907 as endorsed hereon, or in a book kept for that purpose, for the several amounts, and on the goods and merchandise as specified in the said endorsement, the said insured agreeing to enter for insurance all goods carried by —— giving the kind and quantities at the full value thereof, and failure to do so shall render this policy null and void, and to report the same to the Insurers on Monday of each week (or at such times as they may require)—

At and from point or points in the Harbor of New York as far south as the Narrows, and the inland waters of New Jersey, adjacent and tributary thereto, not north of Bergen Point or south of Elizabethport, and on the North River as far as Piermont, and the East River as far as Throggs Neck.

Beginning the adventure on said property from and immediately following the lading thereof at the place endorsed as aforesaid, and continuing the same until said property shall be safely landed at the place of destination as aforesaid, providing such landing or delivery be made within ten days from the time of the commencement of loading, at the expiration of which time the risk shall terminate, unless extended by endorsement, or unless delayed by some unavoidable casualty. Said lighters to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden, without reference to any provisions on the same subject in marine law, or custom applicable to vessels laden for sea voyages.

Touching the adventures and perils which the said Insurance Company is contended to bear and take upon itself on said trip or voyage, they are of the Seas, Rivers, Fires, and all other perils, losses or misfortunes that shall come or happen to the hurt, detriment or damage of the said goods or merchandise, laden on board of said lighters on the voyage or trip aforesaid. Excepting all perils, losses

or misfortunes arising from the following or other legally excluded causes: From want of ordinary care and skill (such as is common in said navigation) in lading or navigating said lighters; from said lighters being unduly laden; from spilling the cargo by careening of said lighters, in consequence of carelessness or overloading; from loss or damage caused by fire, in consequence of carrying petroleum oil or its products as cargo; from loss or damage caused by explosion of gunpowder or other explosives; from or in consequence of carrying acids, lime or matches; from leakage through the deck or other covering; from Theft, Robbery or Barratry of the Master or any of the crew of said lighters.

Specie, bullion, jewels, bank notes or bills of exchange, deeds, bonds, mortgages, accounts, and all other evidences of debt; plate, medals, paintings, piano fortes, statuary, sculptures and curiosities, are not deemed to be included in any insurance, unless specially mentioned in the Policy and scheduled; nor does this Policy cover or apply to any goods or merchandise upon which there shall be any existing insurance, by or on account of owners thereof.

In case of loss, misfortune or exposure to peril, it shall be the duty of the captain and crew, or those having command, to use the utmost diligence and attention to save the property until some agent of this Company shall arrive, and upon his arrival to assist him in the care and saving of the property, and neglect to do so shall render this Policy void,—and it is understood there can be no abandonment of the subjects insured; nor shall the acts of the insurers or their agents in recovering, saving or disposing of the property hereby insured be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this Policy; but such act shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party.

Immediate notice of the occurrence of all losses shall be given to this Company by the insured; and within thirty days from the time the same may happen, the said insured shall deliver to said Company as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of insured in the property; also, what other

insurance or insurances (if any) there was on said property at the time of said loss, which statement shall be in writing, signed by the insured, and by the owner or owners of the said property, and verified by his or their oath; and so much of said statement as relates to the cause, nature and extent of said loss or damage, shall be verified also by the oath of the master of said lighter or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise this Company will not be liable under this Policy; and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person, and separating the sound from the damaged portion, this Company being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction, as this Company may prefer.

The said loss or damage is to be estimated according to the true and actual cash value on the day of disaster, and this Company will pay such proportion of the said loss as the amount hereby insured bears to the sound value of the property so insured; provided, however, that in case the insured shall have any other insurance on the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or receive of this Company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. In all cases of loss or damage, there shall be deducted therefrom the sum of one hundred dollars.

And the said Insurance Company does hereby undertake and agree to make good, and satisfy unto the said insured (subject to the conditions named herein), all such loss or damage on the said goods, wares or merchandise so laden as aforesaid, not exceeding in amount the sum insured thereon, as shall happen or arise from any of the aforesaid causes or casualties (not excepted), to be paid within thirty days after notice and proof of the loss and interest therein shall have been made by the insured.

And it is understood and agreed, that this Company or its Agents shall have free access at all reasonable hours to the books, accounts, instructions and correspondence of the

insured, containing statements of, or which relate to shipments and receipts covered by this Policy. This Policy may be assigned, provided, that before any loss happens, notice shall be given to this Company of such assignment and its approval endorsed hereon, otherwise this Company shall not be bound to pay any loss upon this Policy; and this Policy may be declared void by either party, on giving — days' written notice to that effect to the other party; but without prejudice to any shipment or liability made or incurred prior to the expiration of such notice.

And it is further provided, and hereby agreed, that if any of the said vessels upon a regular survey shall be deemed unseaworthy, or unfit to prosecute said voyage or trip on account of rottenness or unseaworthiness, then the said Company shall not be liable to make good any loss under this Policy. And it is understood that no loss is to be paid arising from any neglect in not keeping the lighter well pumped out, except in case of accident. And it is Warranted by the Insured that the said lighter or vessel shall, at all times during the continuance of this Policy, be tight, and well found in anchors, cable, rigging, tackle and apparel, as is usual and customary;—also properly manned and equipped in all other things and means necessary and proper for the safe navigation thereof, according to the usage and custom; and that whenever said lighter or vessel shall lie at anchor in the night time, she shall show the proper lights as required by law, so as to warn and give notice to approaching vessels; and that the said lighter or vessel when loaded with cargo, shall at all times have a competent watchman on board.

And further, should any loss or damage under this Policy be occasioned by any other vessel, person or persons, in such a manner that such other vessel, or the owner thereof, or such person or persons, shall be liable therefor, then all claims for such loss or damage shall be assigned over to this Company, and shall inure to their benefit, in proportion to the amount of such loss sustained by them; and it is further agreed, that the Insured shall (without prejudice to this insurance) take such legal proceedings or sue for the recovery of said loss as may be required by this Company.

Losses and average to be adjusted and settled on each voyage or trip separately, and all differences may be submitted to the judgment of arbitrators, indifferently chosen, whose awards shall be binding on the parties, and in case this Company require it, they shall be so submitted. It is furthermore hereby expressly provided, that no suit or action against said Company for the recovery of any claim upon, under or by virtue of this Policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the time of twelve months next after the disaster causing such loss or damage shall occur; and in case any such suit or action shall be commenced against said Company after the expiration of twelve months next after the disaster causing such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced.

N. B.—This Policy is subject to the usuages and regulations of the port of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses, designated by the insurers.

In Witness Whereof, the President or Vice-President of the said Insurance Company of North America hath hereunto subscribed his name, and this Policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by said Company's duly authorized Attorneys in New York City.

Benjamin Rush, President.

Countersigned at New York this 30 day of April A. D. 1906. (Signed) Platt & Jeremiah, Attorneys.

It is a condition of this Policy that any broker, person, firm or corporation who shall procure this insurance to be taken by this Company, shall be deemed to be exclusively the agent of the assured in any and all transactions and representations relating to this insurance, or its cancellation, and further that this Policy shall become null and void and of no effect if the premium hereon is not paid to this Company within sixty days from the date of the Policy.

It is understood and agreed that no custom, usuage or waiver of any kind shall affect, control or void any condition of this Policy, unless endorsed hereon in writing.

No. 4926

FIREMAN'S FUND INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4927

GLOBE & RUTGERS FIRE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4928

NORTHWESTERN FIRE & MARINE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4929

HARTFORD FIRE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4930

NATIONAL LIBERTY INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4931

ÆTNA INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4932

WESTERN ASSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4933

LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD.

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4934

SPRINGFIELD FIRE & MARINE INSURANCE CO.

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4935

FRANKLIN FIRE INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

No. 4936

PHŒNIX INSURANCE COMPANY

versus

COMPANIA DE NAVEGACION, INTERIOR, S. A.

ORDER DENYING REHEARING

Extract from the Minutes of July 18th, 1927

It is ordered by the Court that the petition for rehearing filed in these causes be, and the same is hereby, denied.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4926

FIREMAN'S FUND INSURANCE COMPANY (of San Francisco, California), Appellant,

versus

THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Appellee

Consolidated with Following Allied Appeals

1. Globe & Rutgers Fire Insurance Co. of New York ..... No. 4927
2. Northwestern Fire & Marine Ins. Co. of Minneapolis, Minn ..... No. 4928
3. Hartford Fire Insurance Co. of America, of New York ..... No. 4929
4. National Liberty Insurance Co. of America, of New York ..... No. 4930
5. Aetna Insurance Co. of Hartford, Conn ..... No. 4931
6. Western Assurance Co. of Toronto, Canada ..... No. 4932
7. Liverpool & London & Globe Ins. Co. of London, England ..... No. 4933
8. Springfield Fire & Marine Insurance Co. of Springfield, Mass. ..... No. 4934
9. Franklin Insurance Co. of Philadelphia ..... No. 4935
10. Phœnix Insurance Co. of Hartford, Conn. ..... No. 4936

All tried together and judgment rendered upon the one record.

MOTION AND ORDER STAYING MANDATE PENDING APPLICATION FOR CERTIORARI—Filed July 19th, 1927

Upon motion of the Compania de Navegacion, Interior, S. A., Appellee, in the above entitled and numbered causes, by and through their proctors John D., M. A., & Edwin H. Grace, and

Upon suggesting to the Court that movers desire to apply to the Supreme Court of the United States for a writ of certiorari, in the above entitled and numbered causes, and to this end will require forty-five days within which to prepare the necessary petition and brief in support thereof for filing in the Clerk's office of the said Supreme Court of the United States. It is,

Ordered, that mandates in any one or more of the several above entitled and numbered causes do not issue in any of said causes, until after the elapse of a period of forty-five days from date hereof, and that if application for writ of certiorari covering said consolidated causes be presented for filing in the Clerk's office of the Supreme Court of the United States within the time above stated then that the mandates herein shall be further stayed until such time as the Supreme Court of the United States shall have passed upon said application.

(Signed) Rufus E. Foster, Judge.

New Orleans, La., July 19, 1927.

John D., M. A., & Edwin H. Grace, by (Signed) John D. Grace, Proctors for the Compania de Navegacion, Interior, S. A., Appellee.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 640 to 689 next preceding

this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4926, wherein Fireman's Fund Insurance Company is appellant and The Compania de Navegacion, Interior, S. A., is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 639 are identical with the printed record and supplemental record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 28th day of July, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United State Circuit Court of Appeals, Fifth Circuit.)

Office Supreme Court, U.
FILED
SEP 6 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

Nos. 510 to 520

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD, WITH THE ONE DECISION TO DISPOSE OF ALL:

Globe & Rutgers Fire Insurance Co. of New York;
Norwestern F. & M. Ins. Co., of Minneapolis, Minn.;
Hartford Fire Insurance Co. of America, of New York;
National Liberty Ins. Co. of America, of New York;
Aetna Insurance Company of Hartford, Connecticut;
Western Assurance Company of Toronto, Canada;
Liverpool & London & Globe Ins. Co., of London, Eng.;
Springfield F. & M. Ins. Co. of Springfield, Mass.;
Franklin Insurance Company of Philadelphia;
Phoenix Insurance Company of Hartford, Conn.,

ALSO RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Fifth Circuit, Reversing United States District Court, Eastern District of Louisiana, and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

JOHN D., M. A., & EDWIN H. GRACE,
Attorneys for Petitioner.

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FOREWORD.

The Circuit Court of Appeals for the Fifth Circuit is in direct conflict with the Second and Third Circuits and other authorities, in respect to the determinaton as a matter of law and just application of the terms "seaworthy" and "perils of the sea," as set out in the policies of marine insurance; holding in this case, concerning a small wooden inland-water vessel which was prepared for a special sea voyage under recommendations of underwriters' own marine surveyors, designated in policies of insurance for that purpose, and that vessel thereafter approved by them for such voyage; that when said vessel encountered on the gulf, the second day out, such weather and choppy sea conditions, with waves running from four to five feet high, sufficient to cause her to roll and pitch and pound in the seas continuously for at least three and a half hours, or more, opening up the seams in her wooden hull and causing her ultimate total loss, that notwithstanding those conditions and the underwriters' complete knowledge of the vessel, her type, size and construction, insuring her as such and exacting an extraordinary high premium therefor amounting to from more than six times to more than eight times the ordinary rate for ordinary seagoing vessels, holds that this loss was not a loss by a peril of the sea within the terms of insurance policies, because she could not withstand those waves which were deemed moderate to the big three thousand ton iron steamship, which had this little wooden vessel in tow, even though the master of that steamship testified that while the weather conditions were moderate for his big steamship it was heavy weather for the tug. But the Circuit Court of Appeals guided by their conclusion that what are perils of the sea cannot be determined by

what is an extraordinary, irresistible, overpowering condition of the sea with respect to the particular size and type of the vessel, whatever the size of the waves or force of the wind may be, and therein it is in conflict with other Circuits and contrary to English cases and leading English and American writers of the law of insurance, as shown herein below.

U. S. C. C. A., Fifth Circuit:	*U. S. C. C. A., Third Circuit:*
Decision rendered herein, reversing District Court:	*2 Fed. (2d), 137*, affirming District Court:
" * * * we are of opinion that the phrase 'perils of the sea' does not vary in meaning according to the size and type of vessel."	"Perils of the sea against which it was insured, were such perils as would be extraordinary to a boat of its type."
And reversed the District Court, which had followed the Third Circuit.	Affirmed the District Court.

U. S. C. C. A., Second Circuit:

126 Fed., 111, affirming *162 F., 379*, cites with approval *Thebaud v. Great Western Ins. Co., 155 N. Y., 516*, as setting out the "rule," wherein it is said:

> " * * * the real question presented to the defendant, when the application for insurance was made, was whether this boat, *as she was known to both parties to be*, could make the transit from the port of departure to her destination. * * * "

In *Turnbull v. Janson, 36 L. Ed., 635; 3 Asp. M. C. 433—C. A.*, before James, Baggallay, Bramwell and Brett, L. JJ.

> "Brett, L. J.: If a ship of twenty-four tons is insured for a voyage from Liverpool to New York, she cannot be made seaworthy in the same degree as a ship of four hundred tons sailing on the same voyage would be, but she must be made as seaworthy for the voyage as a ship of twenty-four tons can be made. * * *"

Arnould on the Law of Marine Insurance, 10 Ed., Sec. 710, p. 920, Vol. 2, says:

> "* * * Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means."

Joyce on the Law of Insurance, Vol. 4, § 2159, p. 3687 (with citations of cases) says:

> "§ 2159. * * * If a vessel is built for river service and not for open sea navigation and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea,

> cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the construction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea going vessels, so that the nature of the service for which she was intended is fully known to both parties."

The eleven cases concerned herein stand for trial on the one record and involve the due construction of insurance policies issued in London, England, Toronto, Canada, and in various States of the Union. Their grave importance to our maritime commerce brings forcibly to the front what this Honorable Court said in *Peters v. Warren Insurance Co., 14 Pet., 99-108, 10 L. Ed., 371*, to-wit:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

The foregoing is doubly true with respect to the direct conflict which exists between Circuit Courts of Appeals shown above.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD, WITH THE ONE DECISION TO DISPOSE OF ALL:

Globe & Rutgers Fire Insurance Co. of New York;
Norwestern F. & M. Ins. Co., of Minneapolis, Minn.;
Hartford Fire Insurance Co. of America, of New York;
National Liberty Ins. Co. of America, of New York;
Aetna Insurance Company of Hartford, Connecticut;
Western Assurance Company of Toronto, Canada;
Liverpool & London & Globe Ins. Co., of London, Eng.;
Springfield F. & M. Ins. Co. of Springfield, Mass.;
Franklin Insurance Company of Philadelphia;
Phoenix Insurance Company of Hartford, Conn.,

ALSO RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Fifth Circuit, Reversing United States District Court, Eastern District of Louisiana.

To the Honorables, the Justices of the Supreme Court of the United States:

The petition of the Compania de Navegacion, Interior, S. A., whereof Clyde A. Barbour is President, for a writ of *certiorari*, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States for its review and determination, the case of the *Fireman's Fund Insurance Company, appellants* (respondents in the lower Court and here), *versus The Compania de Navegacion, Interior, S. A., appellee* (libelant in the lower Court, petitioner here), numbered 4926 of the docket of said Court (consolidated with ten other causes, all brought by petitioner against eleven insurance companies, foreign and domestic, on policies of marine insurance, all covering the total loss of petitioner's tug "Wash Gray" and all determined under agreement between party litigants upon the one record).

RESPECTFULLY SUBMITS:

First: The Circuit Court of Appeals for the Fifth Circuit in reversing the District Court herein is squarely and directly in marked conflict with the Circuit Courts of Appeals for the Third and Second Circuits, *The Tornado, Vol. 1, p. 197, A. M. C., 1925, sub. nom, Klein v. Globe & Rutgers Fire Ins. Co., 2 Fed. (2d), 137, 3rd C. C. A.*, affirming the District Court for the Western District of Pennsylvania; and *Farmers Feed Co. v. Insurance Co. of North America, 166 Fed., 111, C. C. A., 2nd Circuit*, affirming the District Court for the Southern District of New York, *162 Fed., 379*, as well, also, against leading cases of State Courts

of last resort and leading American and English authors; in its interpretation of the meaning at law and rightful application of the terms "perils of the sea," and "seaworthy," terms of the very greatest import in the law of marine insurance, seriously affecting our internal, coastwise and foreign commerce, as will be presently shown.

Second: The policies sued on herein cover a small wooden inland-water vessel, built in the United States, of one hundred and five tons according to United States rule (217 gross tons according to Mexican rule) eighty-seven and a half feet long, nineteen feet beam, with nine feet depth of hold; well known to the underwriters before their policies issued, covering a voyage from a gulf port in Mexico to a gulf port in the United States, while in tow of the steamship "Freeport Sulphur No. 1" of about three thousand tons, specially designated by the underwriters to do the towing (Tr., 17). Before entering upon this voyage two expert marine surveyors were designated and required by the underwriters to survey said vessel; they did so, and after all their recommendations were carried out to their complete satisfaction the said underwriters' surveyors approved said vessel as fit and seaworthy for the said voyage (Tr., 75, 76, 176, 177), and, wherein, because of the greater degree of sea perils to which such an inland-water vessel of her size and type and construction might be exposed, as compared with an ordinary sea-going vessel, the underwriters herein, respondents, showing their full appreciation thereof charged premiums varying in amount among them, from more than six times to more than eight times the premium ordinarily charged on ordinary sea-going

vessels, to meet the relative degree of danger from sea perils, or, as the policies put it, "perils of the sea."

Third: The District Judge, in referring to what the two expert marine surveyors to the underwriters did, who were designated by the underwriters for this particular service and whose reports were delivered to respondents before the policies issued (Billin, an underwriter, Tr., 491), reports which not only stand without contradiction but are not by even one word questioned or critisized by any witness, says, in his opinion, at Tr., 620:

> "Because of the 'Wash Gray's' size, type and open sea voyage intended, the insurance risk was unusual, and therefore, when application was made, for insurance, the underwriters required an inspection for seaworthiness, general fitness and towing arrangements for that voyage. For the purpose two marine surveyors, representing various underwriters, made a thorough, critical inspection, following by recommendations for certain overhauling, particularly of her towing-bitts and decking, for the planking up of doors, ports, windows and other openings, for her pumps and also for her complement of men. They formally reported to the underwriters that these requirements had been complied with, certified her seaworthiness, and particularly her fitness for the particular voyage contemplated. Further, because of the extra hazardous risk involved in the transit of this small inland-vessel in tow at sea, the

> premiums were rated up considerably by the underwriters. These varied, in the different policies, between one and one-half to two and one-eighth per cent."

And the Circuit Court of Appeals, speaking of a time when the "Wash Gray" had covered the greater part of her sea voyage without anything of moment occurring, and referring to the second night out, when the wind had acquired such velocity to set up a choppy sea, with waves running from four to five feet high, a condition of wind and sea, such as it was, was of sufficient force and volume to become and did become irresistible and overpowering to her, and would be to any other vessel of her type, size and construction; which wrought her total destruction, the Appellate Court saying (Tr., 648):

> " * * * we accept the trial court's finding of fact that the loss was caused by the condition of weather and sea."

The Appellate Court still further says, speaking of that condition of the sea (Tr., 646-647):

> "By eight o'clock that night a moderate northeast breeze was blowing against the current, and as a consequence the sea became choppy. A speed of nine miles an hour had been maintained from the beginning of the voyage, and the strong current increased that rate of speed through the water in the choppy sea to 10½ miles an hour. As soon as the 'Wash Gray' encountered the choppy sea, she began to roll and pitch but she gave

> no signal of distress until 11:30 p. m., or 3½ hours later. In the meantime the speed was not slacked, and the rolling and pitching continued. At 10 P. M. it was discovered that the towing bitts of the 'Wash Gray' were working loose, and that she had shipped considerable water. An attempt was made to pull the bitts back in place by a Spanish windlass, but by 11:30 p. m. enough seawater had entered through her seams to force her down by the head; and then a signal of distress was given, and the hawser was cut. The 'Freeport Sulphur No. 1,' came alongside and remained until daylight, and then, after unsuccessful efforts to pump the water out, proceeded to tow at slow speed until 11:12 on the morning of the 8th at which time the tug sank and became a total loss."

The District Court, among other facts, which, too, stand without contradiction, in noting the efforts made by the crew of the "Wash Gray" to save that vessel, says that her pumps,

> "both in hand and steam were worked full power and time in an effort to discharge the water pouring in her open seams." (Tr., 609.)

Speaking of the sea and weather effect upon the little 105-ton wooden inland-water water tug, as compared to the 3000-ton big iron steamship "Freeport Sulphur No. 1," the master of that vessel, a witness produced by respondents, testifying to towing the wooden

inland-water tug, "Wash Gray," says, without contradiction whatsoever (Tr., 53):

> "However, what is a light and moderate swell aboard a three thousand ton ship could be considered as heavy weather aboard an eighty foot tug boat, being towed at the rate of nine miles per hour."

Respondents' own witness, said master of many years' experience, testfies again without contradiction (Tr., 427) that where even a wooden ship—without distinction as to her size—rolls or pitches in the sea (and such the "Wash Gray" did for several hours, as found by the Circuit Court of Appeals in the above quotation, based on uncontradicted evidence), "it has a straining effect on a wooden ship and, of course, the seams will open;" and, further (Tr., 423), that a choppy sea is hard on a small boat.

The Court will note, too, that with a head wind which was blowing from a northerly direction, at a velocity of approximately twenty-five miles an hour (Tr., 409) and the tug "Wash Gray" being towed from a southerly direction against that wind at a speed of approximately nine miles an hour, that the combined meeting movements of wind and vessel gave a wind force against the vessel of approximately thirty-five miles an hour, a wind force rated by the weather bureau scale as a moderate gale. Then, too, the four to five foot choppy seas presented such a condition to this little tug with a mean draft of approximately seven and a half feet easily comparable to a big steamship of a mean draft of thirty feet, pitching and rolling into

monstrous cross waves of a height equal to twenty feet. In each instance both vessels would be contending for their existence against waves of two-thirds their respective mean draft, threatening to encompass their absolute destruction, just as they did to the "Wash Gray"—a peril of the sea, a peril insured against.

Fourth: Respecting the actual cause of the loss of this vessel the Appellate Court says (Tr., 648):

> " * * * we accept the trial court's finding of fact that the loss was caused by the condition of the weather and sea,"

and the District Judge, in commenting upon that same condition of weather and sea, following the Third and Second Circuits in his conclusions (Tr., [redacted]): 608

> "This, for a vessel of its size and type, was an extraordinary condition, amounting under the circumstances, to such perils of the sea as the contract contemplated."

The trial Court herein, in the instant cases following the Circuit Court of Appeals for the Third Circuit, in *The Tornado, A. M. C. 1925, p. 197, Vol. 1 (2 Fed. [2d], 137)*, says, in respect to the comprehensive meaning, in law, of the term "perils of the sea" (Tr., 607):

> "Taking up the contentions made as stated, the first makes direct issue with the libelant's contention as to the meaning of the term peril of the sea. Upon this point I am fully persuaded by the carefully considered opinion in the 'Tornado' case, cited and

> briefly quoted *supra*, and conclude that the implied warranty of the contract was that the 'Wash Gray' was a seaworthy inland-water vessel, and was able to withstand all ordinary perils upon such waters, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its size and type."

The Circuit Court of Appeals for the Third Circuit, in passing on the above referred to case of the "*Tornado*" (followed by the trial Judge in the instant cases) in an opinion appearing in *Vol. 1, p. 197, A. M. C. 1925 (sub nom Klein v. Globe & Rutgers Ins. Co., 2 Fed.* [2], *137)*, concludes:

> "We are in accord with the conclusions of the learned District Judge (Western Dist. Penn.) and adopt his opinion as expressing our views. * * * "

Among other things stated in the "*Tornado*," *supra*, standing as the opinion of the Circuit Court of Appeals for the Third Circuit, it is said:

> "What are the 'perils of the seas' contemplated in the policy? In their excellent and exhaustive brief, counsel for the respondent have undertaken to answer the query by the citation of a number of cases wherein the term is defined. Nearly all, if not all, of those cases had as subject matter policies upon sea going vessels, and while we adopt the underlying principles which led to the definitions, we cannot accept the literal definitions be-

> cause of the variation between the underlying facts of the instant case and those of the cases cited. In arriving at the meaning of the terms in the present policy we must keep in mind the kind of boat insured, the voyage contemplated and the nature of the risk assumed. * * * The implied warranty of the libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river, and *the 'perils of the seas' against which it was insured were such perils as would be extraordinary to a boat of its type.*" (Italics ours.)

The Court of Appeals for the Fifth Circuit, in reversing the trial Judge herein, who had followed the above opinion, does, in commenting upon that opinion, which prevails in the Circuit Court of Appeals for the Third Circuit, with which the Fifth Circuit has placed itself directly in conflict, says (Tr., 650):

> "The case of Klein v. Globe & Rutgers Insurance Company (the 'Tornado,' C. C. A., 3rd Cir., 2 Fed. [2], 137) relied on by the District Judge in his opinion, and by the appellee here, *seems to sustain the position that what constitutes a peril of the sea is to be determined by the size or type of the insured vessel.* (Italics ours.) Unless that case is distinguishable from this one by a difference in the risks insured against, by the probability that the loss of the vessel there insured was caused by striking a log in the river, or

> by a fact that the language relied on was used in connection with the extent of the implied warranty of seaworthiness, *then, that case does sustain the decree of the District Court.*" (Italics ours.)

However, notwithstanding what is said by the Circuit Court of Appeals for the Third Circuit, respecting the type of vessel insured, the Circuit Court of Appeals for the Fifth Circuit places itself in these instant cases, squarely in conflict therewith, saying:

> "* * * we are of opinion that the phrase 'perils of the sea' *does not vary in meaning according to the size or type of vessel.* (Italics ours.) The owner of a vessel impliedly warrants its seaworthiness. Any vessel, whatever its size or type, to be seaworthy, must be able to withstand the ordinary perils of a voyage at sea, Arnould, 686. A vessel is unseaworthy that does not measure up to this minimum requirement."

But an examination of *Arnould on Marine Insurance*, cited by the United States Circuit Court of Appeals for the Fifth Circuit, where that author is dealing with inland-water vessels required to perform a voyage on the high seas, that authority, with its citation of leading English cases, most conclusively shows that it does not support the contention set up by that Court; on the contrary, it is not only squarely, unequivocally, directly in conflict with that Court, but most clearly bears out the Circuit Court of Appeals for the Third Circuit. Here is what can be found in *Section*

696 of Arnould on Marine Insurance, 10th Edition, p. 902, with citation of leading English cases:

> "§696 * * * There is no fixed standard of seaworthiness; the degrees of seaworthiness required depends on the nature of the adventure (citation of authorities.) Therefore, for the purpose of determining the extent of the warranty, evidence can be given that a ship insured for a certain voyage was from her construction not capable of being made as fit to encounter the perils of the voyage as any ordinary vessel; and in such a case the utmost that the warranty requires is that the particular ship shall be made as fit for the voyage as is practicable."
>
> (Authorities are cited in foot note together with special reference to §710 of this work for further discussion of this topic.)

Turning to §*710 (Arnould on Marine Insurance, 10th Ed., 919-920)*, cited in the foot note to the above §696, we find the first paragraph deals with ocean going vessels; the second paragraph deals with inland-water vessels having insurance coverage for an outside or sea voyage, as follows:

> "§710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. 'The ship,' said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way,

may be fairly expected to encounter' on the voyage (citation of authorities). * * *

"*Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage.* (Italics ours.) The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. (p) Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, *the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means* (italics ours). But he is bound to that much (r); and even such a description of the subject of insurance in the 'slip,' as that it is an 'abandoned ship' does not dispense with this warranty and the assured's obligation under it (s). Whether in fact the vessel was in such a condition as satisfies this warranty in the particular case is a question for the jury (t)."

Joyce on the Law of Insurance, Vol. 4, §2159, p. 3687, and citations, is, also, directly at variance with the Circuit Court of Appeals for the Fifth Circuit.

Fifth: The Circuit Court of Appeals for the Fifth Circuit has, also, placed itself directly in conflict, not only with the Court of Appeals for the Third Circuit *(supra)*, but so, also, with the Circuit Court of Appeals for the Second Circuit, wherein, in the *Farmers' Feed Company v. Insurance Company of North America, 166 Fed., 111* (affirming the District Court for the So. D., N. Y., *162 Fed., 379)*, the Circuit Court of Appeals for the Second Circuit said:

> "It is not pretended that any fraud or misrepresentation was practiced upon the Insurance Company in order to secure the policy. The Mackey was undoubtedly very old and somewhat decayed, but her condition, her history, and all the facts regarding her were fully known to the company at the time the policy was executed, a written record stating all the particulars being on file with the company. The underwriters knew that she was not a desirable risk, they knew that they were taking more than the ordinary hazard and they guarded themselves against it by charging more than the ordinary premium. * * * "
>
> "We concur with the District Judge in thinking that when the respondent 'knowingly took the risk, at a high premium, it should be held to its bargain and not be permitted to resort to the terms of the policy to overcome the claim.' The facts bring the case within the rule of Thebaud v. Great Western Insurance Co., 155 N. Y., 516, 50 N. E., 284, and cases cited."

The District Court in the above case (So. D., N. Y., *162 Fed., 379)* quoted at length from *Thebaud v. Insurance Co. (supra)*, and the Circuit Court of Appeals, 2nd Circuit, referred to this case as evidencing the rule, as above shown, and from that quotation the following is taken:

> "Indeed it is not easy to perceive why an insurance company, by reason of the formal words of clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud.
>
> * * * * *
>
> "But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiv-

> ing the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction known to it at the time of taking the risk would scarcely be consistent with commercial morality."

Petitioner further represents that the three preceding cases were submitted to the Circuit Court of Appeals for the Fifth Circuit and that Court has placed itself directly in opposition thereto, by, we believe, having overlooked the fact that it was held in each case as in other authorities, that where an underwriter has knowledge of all the facts which go to the seaworthiness of the vessel, and, in the light thereof, issues its policy and accepts the premiums, especially premiums rated up on account of the risks to such a vessel, it cannot then resort to the terms of the policy, *in relation to seaworthiness of the vessel*, which is, under such circumstances waived, and the contract then stands considered effective between the parties in respect to the vessel, as each party knew that vessel. The Circuit Court of Appeals saying, through apparently a misunderstanding of those cases (Tr., 650):

> "Appellee also relies on Farmers' Feed. Co. v. Insurance Co., 162 F., 379, decided by the District Court for the Southern District of New York, and affirmed by the Circuit Court of Appeals, 166 Fed., 111; and on Thebaud v. Great Western Insurance Co., 155 N. Y., 516. Recovery was allowed in each of

> those cases on the actual contract which was held to be different from the contract evidenced by the insurance policy. It was merely held that effect should be given to the actual contract. The facts in this case do not warrant the conclusion that appellant bound itself by its conduct or by any agreement to accept the risk of unseaworthiness."

But what is said by this same Circuit Court of Appeals for the Fifth Circuit in last above sentence, appears rather obscure when considered in connection with what they say on Tr., 649:

> "Appellants made its own examination and survey and thereby waived the implied warranty of seaworthiness."

And the cases criticised *(supra)* by the Circuit Court of Appeals (5th Cir.) held in effect likewise, i. e., that the underwriters having gained such actual knowledge of the vessel insured before that insurance was placed, must be held to have waived the provisions of the policy in respect to seaworthiness; and while in the District Court for the Southern District, New York, the Circuit Court of Appeals for the Second Circuit and the Court of Appeals for the State of New York held the underwriters liable in their contract, saying that to hold otherwise "would be to encourage fraud;" to sanction acts on the part of the underwriters which "would scarcely be consistent with commercial morality," thereupon, the underwriters were held to the knowledge they possessed when concluding

the contract. But the Circuit Court of Appeals for the Fifth Circuit gives no effect whatever to their finding that the underwriters in the instant cases had made their "own examination and survey" of this vessel, and reversing the lower Court, ordered all the libels dismissed.

On petitioner's application for a rehearing there was attached thereto a certified copy of the libel and policy of insurance sued on in the above case of *Farmer's Feed Co. v. Insurance Co., 162 Fed., 379*, affirmed *166 Fed., 111*, and appear in Tr., 679-686.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may issue directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court a full and complete transcript of record of all proceedings of said Court in the above entitled cause to the end that said cause may be reviewed and determined by this Court as provided by law and your petitioner will ever pray.

COMPANIA DE NAVEGACION, INTERIOR, S. A.,

By C. A. BARBOUR,

President.

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioner.

STATE OF TEXAS,
COUNTY OF HARRIS,
CITY OF HOUSTON.

CLYDE A. BARBOUR, being first duly sworn according to law, deposes and says that he is the President of the Compania de Navegacion, Interior, S. A., the above petitioner, and that he is qualified and has authority to act herein for the foregoing petitioner, that he has read over the foregoing petition and that the statements contained therein are true and correct to the best of his knowledge, information and belief. That Compania de Navegacion, Interior, S. A., is a corporation.

(Sgd.) C. A. BARBOUR.

Sworn to and subscribed before
me, this 27th day of August, 1927.

(Sgd.) EARL T. ZYLICZ,

Notary Public, Harris County, Texas,
My Commission Expires June 1, 1929.

I hereby certify that I have examined the petition in this cause and am familiar with the facts in this case, and that in my opinion the said petition is well founded and that the cause is one in which the prayer of the petition should be granted by this Honorable Court.

JOHN D. GRACE.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

Petitioners desiring to send their inland-water, twin screw tug, "Wash Gray," from Tampico, Mexico, where she had been employed on the Panuco River, to Galveston, Texas, to have a new type of engine installed, made inquiries through their New York brokers to ascertain if underwriters would insure this wooden inland-water vessel for this special voyage, which would in greater part be out on the Gulf, and, if so, upon what terms and conditions. Whereupon, the underwriters separately agreed to write the risk in varying sums, which aggregated eighty-five thousand dollars ($85,000.00), but at a very much higher rate of premium than charged on ordinary sea-going vessels, the underwriters taking into consideration the

character of the vessel and the perils to which she might be exposed (Billin, underwriter, Tr., 491).

Insurance effected was:

> "Against the adventures and perils of the harbors, bays, sounds, seas, rivers, and other waters as above named, and fires, that shall come to the hurt, detriment or damage of said vessel or any part thereof. * * * " (Tr., 17).

The underwriters inserted in their policies the following warranties, among others, of special note (Tr., 17):

(a) For that part of the voyage on which this tug was lost that she should be "*in tow of the steamer 'Freeport Sulphur No. 1.'*"

(b) "*Vessel and towing arrangements subject to approval of surveyor of United States Salvage Association, James F. Taylor.*"

Some of the policies stipulate in lieu of the above paragraph (b) that:

> "*Vessel and towing arrangements subject to Lloyd's or other approved surveyor.*"

Accordingly, both Mr. James F. Taylor, the above named surveyor, and Mr. Verne Dyer, who is a Lloyd's surveyor, and surveyor to the New York Board of Underwriters, were required to survey the "Wash Gray" and her towing arrangements.

Each and very one of the defendants herein admit that they are members of both the above mentioned United States Salvage Association and the New York Board of Underwriters.

Accordingly, these underwriters' expert marine surveyors visited the "Wash Gray," and after having surveyed and examined her, made various recommendations (Tr., 74 and 177), which, in their opinion, would fit her for the proposed voyage; and after these recommendations had been carried out to their complete satisfaction, said James F. Taylor reported, among other things, as follows (Tr., 75-76):

> "The undersigned visited the vessel after all recommendations were carried out and found vessel on this 10th day of May, 1922, in seaworthy condition, and fit to be towed to the port of Galveston, Texas."

Mr. Verne Dyer reported, among other things (Tr., 176-177):

> "In my opinion this vessel is in first class condition to be towed to any Texas port during the next sixty days."

Both Mr. James F. Taylor (Tr., 73) and Mr. Verne Dyer (Tr., 74) thereafter separately reported in identical terms as follows:

> "Wash Gray ready for sailing, vessel seaworthy and approved, also towing arrangements approved, carries steam and crew, date of sailing furnished later."

These reports were signed, respectively, by each one of said surveyors.

Mr. Verne Dyer was called as a witness in this case and was examined and cross-examined under a commission. After testifying to his twenty-two years service as a marine surveyor, etc., he made answer to the sixteenth direct interrogatory (Tr., 72), as follows:

> "In my opinion the 'Wash Gray' left Tampico in first class seaworthy condition to be towed to Galveston, Texas, under ordinary conditions of weather and sea. Every requirement as usually demanded by insurance representatives having been fulfilled."

The survey reports from these expert marine surveyors, and the testimony of Mr. Dyer above quoted, all stand without any contradiction or criticism of any kind whatsoever from any witness produced by either side.

Mr. John D. Grant, a surveyor for the London Salvage Association and for various underwriter associations, and leading underwriters (Tr., 111, 112), with twenty years' experience (Tr., 112), made an examination of this vessel just prior to her departure from Galveston, Texas, when she was sent to Tampico, Mexico, about two years prior to her loss on the return trip. He affords many particulars of the wood construction of this vessel, sizes of her timbers, plankings, etc., affording, also, much information re-

specting her machinery, etc. (Tr., 169-170, etc.) and, on Tr., 171, testifying to her double towing bitts, says:

> "The forward towing bitts are 12" x 12" with a table connecting them together, these bitts pass through the deck and are securely fastended in the bottom of the tug."

And, at Tr., 133, says:

> "She was a good strongly constructed little boat."

Several other witnesses of wide experience in construction and repair work, notably Captain C. A. Barbour (Tr., 145), and Jessie Barbour (Tr., 79, 80), have testified to the excellent condition of that vessel.

So, also, the machinery and equipment of this vessel was specially inspected at Tampico by the Mexican Government Inspector for Merchant Marine. His report thereof is dated June 26, 1922, a few days before her departure (Tr., 76, 77, 78). It shows in detail the equipment of the "Wash Gray" and the complete excellent condition thereof. The vessel was originally built in Pennsylvania and some years thereafter underwent such extensive repairs she was practically rebuilt just before she was sent to Tampico, about two years before she was lost, coming back, as stated herein.

Even Captain C. G. Haslund, master of the steamship "Freeport Sulphur No. 1," the vessel which had the "Wash Gray" in tow when lost, who was called as

a witness by the underwriters, testified, under cross-examination, as follows:

> Q. So far as you know, Captain, did the owners of the "Wash Gray" in any way or to any extent, neglect to do anything that they should have done for the safeguarding and proper towing of the "Wash Gray?"
>
> A. So far as I know, they did not.

All of the foregoing testimony stands absolutely uncontradicted by a single witness.

Joyce on the Law of Insurance, Vol. 4, Sec. 2159, p. 3687, 2nd Ed. (1917), with citation of authorities, in speaking of inland-water vessels taken out to sea, says:

> " * * * If a vessel is built for river service and not for open sea navigation and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea, cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the construction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea

going vessels, so that the nature of the service for which she was intended is fully known to both parties."

See, also, *Arnould on Law of Marine Insurance* (set out in petition *supra*).

It is not only a most noteworthy fact that the underwriters have not attempted to attack their own surveyors' reports on the seaworthiness of the "Wash Gray" (with the cumulative evidence on the same subject unqualifiedly in support thereof), through any witness or document, but it is equally true that although they specifically plead three separate purely technical affirmative defenses, set out as such, they do not plead unseaworthiness, which, as the Court thoroughly understands, must be pleaded and proven as a matter of defense, if the underwriters should seek to rely thereon, because a presumption of law obtains that the vessel, on the commencement of her voyage, is seaworthy.

The overwhelming amount of evidence above referred to, secured from the highest type of expert marine surveyors, some of them making the examination for this particular voyage, stands without contradiction from any witness whomsoever.

In that leading English case, *Davidson v. Burnand, C. P., Vol. IV, p. 117, at p. 120*, the Court said:

"So far as regards the question of unseaworthiness, that is disposed of by the evidence of competent persons that the ship was seaworthy, and it seems, therefore, after

that, impossible for us to say that in our judgment the vessel was unseaworthy."

And, in *Batchelder v. Insurance Co., 30 Fed., 459, 460*, referring to surveyors' reports, the Court said:

"As we have seen the surveyors report her in good condition. If this report was unattacked it would be conclusive."

Notwithstanding the foregoing uncontradicted probative evidence and, presumably, the settled law, the United States Circuit Court of Appeals for the Fifth Circuit by reason of setting up, in effect, a uniform standard for its application of the terms "perils of the sea" and "seaworthy," without taking into consideration the size, type and construction of the vessel, has held in the face of the underwriters' own surveyors' reports, and the construction which is placed upon such reports by American and foreign tribunals, that because the condition of the sea and weather was such to operate merely as a moderate sea to a three thousand-ton iron steamship, but was extraordinary, overwhelming and irresitible to a little wooden inland-water vessel, insured as such at an extraordinary premium, that, therefore, she was unseaworthy, and lost by reason thereof, and not by a peril of the sea.

But see American and English decision, *supra*, on conclusiveness of marine surveyors' reports not disputed in any way by any witness.

Then, too, it has been held, as follows:

"If the evidence in the case established the fact of seaworthiness, there is, where a disaster occurs without any discernable

cause a presumption of fact that the loss was occasioned by some of the perils insured against."

Moores v. Louisville Underwriters, 14 Fed. Rep., 226 (C. C.).

See, also, *Pennsylvania R. R. Co. v. Mannheim Insurance Co., 56 Fed. Rep., 304.*

In *Arnould on Marine Insurance, 10 Ed., p. 936, Sec. 726*, in speaking of methods for proving seaworthiness of a vessel, says:

"Section 726: With regard to the means of proving that the ship was unseaworthy, or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel; after their evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not."

EACH RESPONDENT SETS UP IDENTICAL TECHNICAL AFFIRMATIVE DEFENSES, THREE IN NUMBER, ALL OF WHICH WERE CONSIDERED BY THE DISTRICT COURT, NONE OF WHICH WERE CONSIDERED BY THE CIRCUIT COURT OF APPEALS.

Although the said purely technical defenses are ignored by the Circuit Court of Appeals, because of its own opinion in the premises of what constitutes "perils of the sea" and seaworthiness, we will very briefly

take up each one of said defenses in their order; although a consideration thereof is really not necessary for the purpose of determining what petitioner submits to be grave errors in the opinion of the Circuit Court of Appeals herein on most important points in the law of marine insurance.

First Affirmative Defense: In their "first affirmative defense" (Tr., 30-32) respondents urge that petitioner entered into a written contract with the owners of the steamship "Freeport Sulphur No. 1," the vessel which the underwriters stipulated should do the towing, wherein and whereby it was agreed that the steam tug "Wash Gray" should be towed by the steamship "Freeport Sulphur No. 1," and that the "steamship 'Freeport Sulphur No. 1' is not responsible in any way for any loss or damage to the 'Wash Gray,' " and that information of this condition in the contract was concealed until after the loss of the tug. That it was material to the risk and respondents would not have issued the policy had they known of this fact.

By reference to the transcript, page 17, it will be noted that the underwriters conditioned the insurance upon the following warranty:

> "Warranted confined to the use and navigation of the covering trip from Tampico to Freeport, Texas, *in tow of steamer 'Freeport Sulphur No. 1'* * * * ."

This warranty, as the Court appreciates, simply means that if any vessel other than the steamship "Freeport Sulphur No. 1"—the one designated in the warranty—was employed to do the towing, such action

would breach the warranty and vitiate the insurance. Necessarily, then, the underwriters well knew that by inserting that warranty in their policy not only would a contract exist for that towage, but distinctly knew that the owner of the "Wash Gray" was bound to contract with the owner of the "Freeport Sulphur No. 1" for this service. It necessarily follows, further, we believe, that it is reasonable to presume that each party had a right to believe that this contract would be made as was usual and customary for the owners of that steamship to agree to, for such towage service; and it is shown, without contradiction, that just such a contract was made. The stipulation complained of standing as one which has always been inserted by the owners of said steamship in every such contract made by them in their years of service (Mims, Tr., 198, 199).

Mr. Mims still further testifies (Tr., 199) that if the owners of the tug "Wash Gray" had even agreed to pay a higher towage price to eliminate from the contract the stipulation that the service would be at the risk of the tow, the Company, without regard to what amount might be offered, would not have entered into such a contract, or any contract different from the one made in this case. Such was the contract made necessary to secure the service of that vessel which was required in the policy to do the towing. This stands without contradiction.

Hence, the trial Judge held (Tr., 612) that:

> " * * * They (the underwriters) did not inquire for a view of the contract. It is not clear that their brokers and agents did not know of the very terms of the towage con-

> tract, since it was stipulated as a condition precedent to the underwriting that the specific steamship 'Freeport Sulphur No. 1' and another later to be selected and approved by them for their agents, was to do the towing."

This Honorable Supreme Court held in a case involving land fire insurance, while discussing this general principle, in *Clark, et al., v. Manufacturers Insurance Co., 8 How., 236, 249, 12 L. Ed., 1061-1066*, that:

> "The relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. * * * We think that the governing test on it must be this: It must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it and that the insured, being asked nothing has a right to presume that nothing on the risk is desired from him."

In England, in *Freeland v. Glover (7 East., 457)*, a letter was disclosed to the underwriters that mentioned an earlier letter which was not asked for. Held that the underwriters by their failure to ask for this document, the existence of which they knew, operated as a waiver of its contents.

In *Asfar v. Blundell, 2 B. R., 202*, Matthew, J., says:

> "It is a well settled principle of insurance law that underwriters are not entitled

> to be told what they waive all inquiry about. In this particular case they were told that there was a charter, and if they had wanted to learn the contents of that charter, they had only to inquire."

In another leading English case, *Clark v. Boehm, 3 Burr. (1910)*, Lloyd Mansfield says:

> "The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of or what he waives being informed of."

Again, in *Inman Steamship Company v. Bischouff, L. R. 7 App. Cas., 670*, it appears the underwriters were afforded knowledge that the "City of Paris" was under a contract of charter party. As the underwriters did not ask for particulars of that contract the Court held that the particulars were waived.

Since the owners of the "Wash Gray" were bound, under the very terms of respondent's policy of insurance, to have the steamship "Freeport Sulphur No. 1" do the towing, the underwriters were not merely put upon inquiry, but actually knew of the creation of such a contract, as one made necessary between the owners of said vessel by the very terms of their own policy (Tr., 17). And as this contract was made not only in the usual terms and conditions, but on the only terms and conditions it was possible to make, because in the only terms and conditions the owners of that steamship had ever made in their many years of such service. If the underwriters were not familiar with the terms and conditions of the contract made neces-

sary by the terms and conditions of their policy they could readily have advised themselves thereof, even before requiring the service of that steamship to do the towing.

So, therefore, if the underwriters are estopped from setting up the above referred "first affirmative defense," and are to be held to at least constructive knowledge of the contents thereof; or, as having waived such knowledge; then, their affirmative defenses two and three must fall; because the last two defenses are predicated solely upon their contention in their "first affirmative defense."

Second and Third Defenses: Respondents urge in their second and third defenses that by reason of the terms of the contract for towage, as in their "first affirmative defense" complained of, although that contract in precisely those terms was made necessary by the fact that the policies of insurance specifically require that the steamship "Freeport Sulphur No. 1" should do the towing on that part of the voyage on which she was lost—and it was the only kind of contract her owners would make at any price—that according to their construction of said contract the steamship "Freeport Sulphur No. 1" stands released from actionable negligence, and that if this be true, with the policy of insurance providing that where a third person is released from a liability which would otherwise be subrogated to the assurer upon payment of the claim, that the underwriter becomes released *pro tanto.* So, therefore, the underwriters urge that the tug "Wash Gray" was towed at an excessive speed, respecting which not a single witness has testified

thereto, and further dealing in conjecture and inference, urge that such speed amounted to approximately a concurrent efficient cause of the sinking of the said steam tug. That, therefore, as they did not know anything about the terms of this contract until a copy thereof was contained in the proofs of loss, they should be released from liability because the "Freeport Sulphur No. 1" is released under the terms and conditions of that contract required by the underwriters' policies in designating that steamship to do the towing. This alleged liability, too, is based upon conjecture only. The third affirmative defense is to the same effect, and, further, pleads that the tug "Wash Gray" was towed too fast "in spite of the winds, waves and weather conditions which were encountered on said voyage." That Captain Clyde Barbour, the president of the company owning the "Wash Gray," knew that she would be towed at a speed too fast.

Taking these two affirmative defenses in their order, petitioner submits that the testimony of all the seafaring men examined in this case, who discussed the question of speed, not a single one produced either by petitioner or respondent have criticized in any way to any extent the action of the master of the "Freeport Sulphur No. 1" towing at the rate he did under the existing circumstances. Other testimony shows that under all the circumstances the steamship "Freeport Sulphur No. 1" both as to towing and everything else was free from blame. Captain Haslund, master of the steamship "Freeport Sulphur No. 1," has twenty-four years continuous service at sea, four years of which as a master in towing service. He was, of course, appointed by the owners of the ship.

Various witnesses testify that much must be left to the discretion of the master, assuming he is competent. The record shows without contradiction that the "Wash Gray" could travel on inland water at a rate of twelve miles an hour without any danger of injury to her (Tr., 358).

The undisputed testimony shows, contrary to respondents averments, that the owners of the towing steamship did not say anything to Captain Barbour, president of the petitioning company, or to any body else represented or interested in the ownership of the "Wash Gray," concerning the speed at which the tug would be towed (Tr., 201) nor was any direction given to the master of that steamship by the owners of that steamship respecting what time should be made in handling this tug; on the contrary, it is shown without contradiction in the testimony of Mr. Mims, representing the owners of the steamship, that this question of speed was

> "Left at the discretion of the master of the towing vessel, and I assume the master of the tug, too, if they were going too fast—of course, it depended a good deal on the weather. It was left to the discretion of the master of the towing vessel, and the master of the vessel that was being towed." (Tr., 201.)

That testimony stands absolutely without any contradiction whatsoever. It was shown, too, by the testimony of several witnesses, without contradiction, that it is necessary in towing such a vessel to, at all times, keep the towing line taut, because of the con-

stant danger that such a vessel, in tow, may run off to one side or the other into the trough of the waves, and be tripped or turned over, with probable loss of life of every man on board.

It was even admitted in the original brief (p. 56) filed by respondents on their appeal, as follows:

> "Libelant has taken elaborate testimony to prove that good seamanship requires that a continual strain be kept on the towing hawser to keep it from becoming slack and that a sufficient speed is necessary to keep the towed vessel from sheering into the trough of the waves. This is obviously true and we should have thought it more obvious that testimony need not have been taken to prove it."

And, in respect to the reasonableness of the towing done under all the conditions present, we have the following from two witnesses produced by respondent:

Mr. C. C. Marshall, deck officer, and Captain C. C. Haslund, Master, of the steamship "Freeport Sulphur No. 1," were both called as witnesses for respondents and testify as follows:

Mr. C. C. Marshall, deck officer of the S/S "Freeport Sulphur No. 1" (Tr., 439), on cross-examination, says:

> Q. So far as you know, within your personal knowledge, did the officers or crew of the "Freeport Sulphur No. 1," in any way, at any time, do anything to jeopardize the safety of the "Wash Gray?"
>
> A. No, sir.

Q. So far as you know, during the time that the "Freeport Sulphur No. 1" was towing the "Wash Gray," did they do everything that is usual and customary and that should be done with respect to the safety of the tug, that they could?

A. Yes, sir.

Capt. C. C. Haslund, master of the said steamship, testified, at page 432, as follows:

Q. And so far as you and your vessel are concerned, and as a practical seaman, did you, or any of your men neglect to observe, or take proper care or caution in the handling of the "Wash Gray?"

A. No.

The foregoing testimony stands without contradiction and comes from respondents' own witnesses.

In the *Czarina, 112 Fed. Rep., p. 541, at page 545,* the Court says:

"Upon the question whether a prudent master, surrounded by the same circumstances, would have pursued the same course, the evidence of experienced navigators would have been competent. The Frederick E. Ives (D. C.), 25 Fed., 447. No witness of that character testified that the master of the Czarina, in leaving the raft did what a prudent and careful navigator would not have done under like conditions."

Nevertheless, respondents did not produce a single experienced navigator, or, for that matter, any one to testify whether the speed at which that vessel was towed evidenced good seamanship, within the discretion allowed to the master in charge of the operation.

And in the above case *(112 Fed. Rep., p. 541)*, at page 544, the Court says:

> "But the Czarina cannot be held liable for the subsequent loss of a portion of the raft, before it was finally recovered, 'because the master in an emergency did not do precisely what, after the event, others may think would have been best.' The Hercules, 19 C. C. A., 496, 73 Fed., 255. This principle of law was very clearly expressed by Chief Justice Waite in the case of The W. E. Gladwish, 17 Blatchf., 77-83, Fed. Cas. No. 17,355:
>
> " 'The tug undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation. More was not contracted for, and more was not expected. When the ice was reached it became necessary to decide whether to lie by or to go on. This involved the exercise of judgment as to what ought to be done under the circumstances. A mere mistake is not enough to charge the tugs with any loss which followed. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made.'

> "The following cases are also to the effect that a mere error of judgment upon the part of the master of a tug will not render it liable for the loss of the tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment. The Battler, 19 C. C. A., 6, 72 Fed., 537; Sonsmith v. The J. P. Donaldson (C. C.), 21 Fed., 671; The James P. Donaldson (D. C.), 19 Fed., 264; The Packer (C. C.), 28 Fed., 156; The Wilhelm (D. C.), 47 Fed., 89; Mohawk, 7 Ben., 139, Fed Cas. No. 9653; The Frederick E. Ives (D. C.), 25 Fed., 447; The Masher, 4 Biss., 274, Fed. Cas. No. 9874."

In *The Wilhelm, 47 Fed., 89, at p. 93*, the Court says:

> "Again, I say, the mere happening of the disaster does not condemn his judgment for some other disaster might have befallen him if he had taken the other course, and been a surer condemnation of him."

In other words, the master of the steamship "Freeport Sulphur No. 1" might have towed the tug in these choppy seas which were striking the tug from every direction, threatening to send it in the trough of the sea—maybe, he could have gotten along alright towing at a little slower speed, but not a witness says it would have been prudent; and maybe, also, a slower speed might have permitted the choppy seas to send that tug into the trough of the seas when her tow line

would then have operated to trip her or turn her over, causing not merely the loss of the tug, but so, also, the life of every man on board. The master of the ship did not gamble with human life as the stakes.

In the *W. E. Gladwish, 17 Blatchf., 77 Fed. Cas. No. 17,355*, by Circuit Justice Waite, it was held:

> " * * * The mere fact of sinking the cargo is not enough. Actual fault, contributing to the loss, must be proven. * * * "

The officers and crew of the "Wash Gray" were outside men, that is, seafaring men (Barbour, Tr., 160). L. Carbajal was her master, and had seventeen years experience at sea (Tr., 49). A. Romero, chief engineer and machinist, nineteen years experience as marine engineer (Tr., 64).

These men were on the "Wash Gray" during all the three and a half hours she was rolling and pitching heavily, her seams opening, all her pumps working; and none of them have said that tug should have been towed in that sea in any other way than she was towed. They made no complaint, evidently satisfied it was the best to be done. When the head of the tug buried and seemed as though it would not come up, then they signalled the steamship "Freeport Sulphur No. 1," and cut the tow line.

The preliminary protest of the "Wash Gray" at Freeport, Texas, made on the day when landed there; the affidavit taken by the underwriters' representa-

tive when the master of the "Wash Gray" was landed from the steamship "Freeport Sulphur No. 1" at Freeport, Texas, he immediately entered protest, which appears on the supplemental sheets pasted in at Tr., page 58. The officers and crew of the "Wash Gray," at the request of Mr. James F. Taylor, as agent of the insurance companies, made a statement signed by the full crew, which appears at pp. 54-57, inclusive; affidavit before United States Consul at Tampico, signed by the master of the "Wash Gray" (Tr., 60-61).

The above extract of the log of the tug "Wash Gray" appears at Tr., 61.

Even if the underwriters would be permitted to insist upon a contract for a certain towage service by a particular steamship, as a condition precedent to the insurance attaching, and then, although such contract be made in the only terms and conditions the services of that steamship have ever been secured, and then set up that those terms and conditions operated to release the said steamship from liability if guilty of actionable negligence, and, under the terms of the policy such a release operated to release the underwriter, petitioners submit, aside from all questions of good faith such contention is open to, the underwriters would be bound at least to prove the actual commission by said steamship of such actionable negligence; and failing therein that alleged release would be inoperative, their being no loss under any circumstance chargeable against the ship, hence none released.

Then, too, the execution of that contract did not of itself operate to vitiate the insurance *eo instanti* with the execution thereof, but the provision of the policy is intended to release the underwriter, *pro tanto*, as any third party may be released of liability without the expressed or implied consent of the underwriter.

However, that the third affirmative defense, predicated upon the first affirmative defense, is unavailing in the absence of testimony of a single witness in support thereof, and cannot be established by an effort to impute negligence herein, on a theory that the "Wash Gray" was towed too fast, we respectfully submit what was said by the District Judge in his opinion herein (Tr., 614), as follows:

> "* * * The speed of the 'Wash Gray' under its own power was shown to have been from ten to twelve miles per hour. She was towed at an average of about nine miles per hour, following nicely and handling well, unstrained and unhurt for the greater part, or three-fourths, of the voyage. The respondents, with no evidence to sustain them, argue upon a theory that this speed should have been reduced after the sea became rough. The evidence satisfied me that the master and officers of the towing ship exercised their best judgment; that the steady speed of about nine miles became necessary to keep the tow lines taut, so as to avoid having the towed vessel sheer to one side or the other, get into the trough of a sea, be thus tripped and

turned over. Opposed to this there is no evidence to show that this desirable result could have been achieved at lesser speed; or that the master of the towing vessel erred in his judgment in maintaining that speed. There is certainly nothing to justify the unwarranted assumption by respondent that the vessel was pulled apart by excessive speed in towing, upon which their theory is predicated, as hereinbefore recited."

Respectfully submitted,

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Attorneys for Petitioner.

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CHARLES ELMORE CROPL
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 510-520, Inc.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California), Respondent,

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD:

511—Globe & Rutgers Fire Ins. Co. of New York;
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520—Phoenix Insurance Co. of Hartford, Conn.,
Also Respondents.

REPLY TO RESPONDENTS.

JOHN D., M. A., & EDWIN H. GRACE,
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JOHN D. GRACE,
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REPLY TO RESPONDENTS.

We respectfully submit that the learned counsel for respondents are in error in their assumption that the petitioners' argument confuses the waiver of the warranty of seaworthiness with what an insurer must show to establish a loss by "perils of the sea."

On the strength of the authorities set out in the "FOREWORD" at page 1-4, of our original brief, we urge that for a determination of what is a loss by a "peril of the sea" it is necessary to consider the size, type and construction of the vessel concerned; and in this regard a loss by a "peril of the sea" is understood to be, as held in the Third Circuit, a loss *where the peril is extraordinary to a boat of her particular size, type and construction.* In other words, that the term "peril of the sea" is a relative term, so that what may not be a peril of the sea for a large iron ocean going vessel may easily be a very grave peril of the sea with respect to a small wooden vessel.

It is an outstanding fact that the underwriters, themselves, after having had their own survey of petitioners' vessel charged a premium amounting to *from more than six times to more than eight times the ordinary premium charged on ordinary sea going vessels;* and when it is considered that the rate of premium is based upon what they may determine as the degree of peril to which a vessel may be subjected it is manifest that the term peril of the sea is relative with respect to the different size, type and construction of vessels, notwithstanding, the Fifth Circuit herein to the contrary.

Having set out in the "FOREWORD" of petitioners' original brief (pp. 1-4) leading cases and quotations from writers of acknowledged authority on the law of insurance, we pass the foregoing point to refer to the effect which the waves and wind, as perils of the sea, had upon this particular little wooden vessel in bringing about her destruction.

It may be mentioned here that both lower Courts found that the "Wash Gray" was lost by reason of the action of the wind and waves upon her. It is shown, even in the opinion of the Circuit Courts of Appeals that the waves and wind were such as to cause this vessel to roll and pitch continuously, during a period of over three hours. It is shown, too, this caused such straining of the vessel even her double towing bitts were loosened, bitts which had been surveyed and after certain work was done thereon under the surveyors' recommendations, stood approved by both underwriters' surveyors. These bitts were not pulled out as stated in respondents' brief, but to some extent under the constant strain worked loose at about 10 o'clock at night, and a Spanish windlass was then rigged to hold them in place, which it did, and within an hour and a half later the master of the tug caused the tow line to be cut because the tug was then in a helpless sinking condition, with water pouring in through seams opened by her rolling, pitching and pounding, which badly strained her.

The testimony of Captain C. G. Haslund, Master of the steamship "Freeport Sulphur No. 1," a witness

called by the underwriters who, having testified that the log of the steamship "Freeport Sulphur No. 1" indicated a moderate swell, stated that this log was kept for the steamship with respect to conditions as they related to the steamship itself, and "not with regard to this little tug behind" (Tr., 421).

In his affidavit (Tr., 53), Captain Haslund, the above named witness, further says:

> "However, what is a light and moderate swell aboard a three thousand ton ship could be considered as heavy weather aboard an eighty foot tugboat, being towed at the rate of nine miles per hour."

And on page 427, this expert mariner, a witness produced by the underwriters, says that where a wooden vessel rolls or pitches in the sea, it has a straining effect on the ship—and he makes no distinction as to size—"and of course, the seams will open up."

It is shown without dispute that the height of the waves were approximately five feet high, and the wind velocity of approximately twenty-five miles per hour, plus the approximate speed of the tug, (nine miles an hour), gives approximately thirty-four miles an hour, making an effective wind pressure against the tug of approximately thirty-four miles an hour, a wind pressure which the United States Government scale (Beaufort) rates as a moderate gale.

It is shown by the record that the mean draft of the "Wash Gray" was approximately only seven and

a half (7½) feet in waves running five feet high, which would equal two-thirds of her draft; so we submit it would appear as a rather astounding contention to say that if a wooden vessel of thirty feet draft encountered monstrous waves twenty feet high, which would be only two-thirds of her draft, and was wrecked thereby, that this loss should not be considered as occasioned by a peril of the sea.

Therefore, the line of petitioners' argument is directed not only to show that the vessel was in a thoroughly seaworthy condition—inspected and approved as such by the underwriters' own surveyors—but that her loss is readily accounted for as from a peril of the sea, unless the Circuit Court of Appeals for the Fifth Circuit is correct in holding herein as a proposition of law "that the phrase 'perils of the sea' does not vary in meaning according to the size and type of the vessel." But, as that proposition, laid down by the Circuit Court of Appeals for the Fifth Circuit, is in conflict with the Third and Second Circuits, and with leading English cases and leading English and American works of high authority on the law of insurance, we believe that this Honorable Court will lay down such a rule as will prevent injustice in respect to an interpretation of the term of "perils of the sea," a condition of the sea which may be extraordinary, with respect to the relative size, type and construction of vessels, just as the underwriters themselves levy a relative measure of compensation or premium for the risk they undertake, broadly differ-

ent upon vessels of different types, size and construction.

Second. At page 16 of respondents' brief, last paragraph, in discussing the towage contract they say it was conceded by petitioner that certain facts were not disclosed; whereas there never has been and petitioners have never at any time conceded that there was any concealment of any material fact.

Indeed the very contract of towage referred to *was actually imposed upon the petitioner by the respondents*, as is shown below.

The policies of insurance sued on expressly show,

> "Warranted confined to the use and navigation of the covering trip from Tampico to Mexico, Texas, *in tow of steamer 'Freeport Sulphur No. 1.'*" (Tr., 17).

Manifestly, unless petitioner did contract for the service of the said steamship, as required by the policy, the insurance would never have attached.

As a matter of fact, we have pointed out in our original brief (pp. 33-38) that the petitioners contracted for the services of the steamship "Freeport Sulphur No. 1," to do the towing between the ports, as required by the policy of insurance, and that the contract so made was in the very terms and conditions in which all the contracts for such services have ever been made by the owners of the steamship "Freeport

Sulphur No. 1," petitioner still further showing in above mentioned pages that no other or better terms could be secured, no matter what compensation might be offered.

So, therefore, we respectfully submit it is a rather astounding proposition for the underwriters to urge that they are relieved from liability because of the terms and conditions of the very contract which those same underwriters compelled petitioner to enter into.

We quote in the pages above referred to of the original brief a decision by this Honorable Court and leading English cases showing that where the underwriters knew a contract was in existence and did not ask for a view thereof that they are considered as having knowledge of its contents or at least having waived information with respect thereto. How much stronger are they justly bound by the terms of a contract they have compelled the insured to make.

Third. At pages 40 and 41 in our original brief, we have pointed out, with quotation of testimony, that there was no agreement or understanding that the vessel would be towed at any particular rate of speed, but that this was left to the discretion of the master of each vessel, with not a particle of evidence to show this speed was excessive, and further that it was necessary to tow the vessel at a speed sufficient to at all times keep the tow line taut to prevent the vessel from sheering to one side or the other, in which event she

probably would be tripped or overturned with the loss of every life on board, with quotation at page 41 of petitioner's brief showing that respondents well understand this to be true.

Believing that we have fully presented the material conflicts between the Fifth Circuit and other circuits as well as with English and American law writers citing leading English and American cases, we do not believe it necessary to make any further presentation in this cause.

Respectfully submitted,

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JOHN D. GRACE,
Of Counsel.

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CHARLES ELMORE

IN THE

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—and—

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Also Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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SUBJECT INDEX.

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The Circuit Court of Appeals having decided that the petitioner had failed to make out its case found it unnecessary to discuss the three affirmative defenses set up by the underwriters in their answer. These defenses were:

(1) The petitioner failed to disclose to the underwriters that the towing company was not to be liable for loss or damage to the *Wash Gray*, a fact material to the risk, and thereby rendered the policy void. *Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 107 U. S. 485..... 15

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Also Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

ANSWER TO FOREWORD OF PETITIONER'S BRIEF.

There Are Marked Differences Between Klein v. Globe & Rutgers Fire Insurance Co., 2 Fed. (2) 137, and this case. The Language Quoted by the Petitioner Is an Obiter Dictum From the Opinion of the District Judge in That Case.

In the foreword to the brief filed by the petitioner,

reference is made to the case of *Klein* v. *Globe & Rutgers Fire Insurance Co.*, 2 Fed. (2) 137. Apparently the petitioner is relying upon a supposed conflict between the decisions in this case and that in the *Klein* case as the basis for its application to this Court for a writ of certiorari. An examination of the *Klein* case, however, shows marked differences in that case from the case at bar. We quote the following from the opinion of the District Judge in the *Klein* case (at p. 140):

> "The *Tornado* (the vessel insured), according to the weight of the testimony, left New Orleans without any water in its hold. It arrived at Pilot Town without having taken any considerable amount, but several hours after arrival was noticed to be listing, and examination disclosed that it was leaking badly, and later sank, despite all proper exertions of the crew in charge. On the trip from New Orleans to Pilot Town, up-river winds and swells were encountered. The wind was not so strong as to suggest the existence of a tempest, but the swells created were such as to give the boat 'a good shaking up'. The watchmen on board have testified that at one stage of the journey from New Orleans to Pilot Town, for a period of about half an hour, the *Tornado* underwent considerable strain. 'She seem to hit something', 'she kept bucking' (jumping up and down), were expressions used to describe the action of the boat. One watchman, Reid, has testified that while this 'bucking' was going on he took his flashlight and went over the boat to determine the cause, and while doing so saw a log come out on the port side under the vessel's guard. It will be remembered that the boat was joined to the barge *Ashland* on that side, and

the space between the hulls was a foot—perhaps a few inches more.

Counsel for the respondent has forcibly attacked this testimony of the watchmen as incredible, and has pointed out that neither of them mentioned a log in affidavits made by them shortly after the misfortune of the *Tornado*, nor did either of them report it to the captain in charge of the tow upon arrival at Pilot Town. In an affidavit made September 14, 1921, Libellant's Exhibit 63, Brandhorst said: 'The wind and swells were so heavy coming down that I believe we struck something.' In an affidavit made on October 25, 1921, Reid said: 'We may have hit something coming down, as the winds and swells were heavy. This is the best explanation that I am able to give.'

The absence of specific mention of the log incident in the early affidavits is undoubtedly a matter for notice, and were there no supporting evidence, we should perhaps be justified in ignoring this part of the testimony of the watchmen by reason of it. *There is such supporting evidence, however, and that evidence in itself very strongly tends to show that the Tornado met her fate from a peril of the river rather than from inherent unseaworthiness. In his deposition, J. G. Sanford, the diver, called by the respondent, who examined the wreck on September 13, 1921, said: 'Well, I found her in good condition; the only thing—I examined her from stem to stern, and the only thing I found was two or three pieces of sheeting, from the stern to right about her midships, as far as I could judge, two or three feet, that was pulled four or five feet away by a log or somtehing striking her; but the inside of the boat didn't seem to be damaged at all.'"* (Italics ours.)

The Circuit Court of Appeals in the *Klein* case said (at p. 144):

> "The respondent has not satisfied us that the learned District Judge did not reach the right conclusion that the boat sank by reason of a peril of the sea, against which she was insured, nor has it satisfied us that the damages awarded were excessive."

It thus appears that in the *Klein* case, striking a log was the peril of the sea which the Court found was the cause of her loss. This, of course, was a fortuitous event. Hence, whatever the Court said in that case was intended to be considered in the light of that proved fact. There was no evidence in the present case of any fortuitous occurrence. We submit, therefore, that the decision in the *Klein* case cannot be treated as a decision contrary to that of the Circuit Court of Appeals in the present case.

Moreover, there is another sharp distinction between the *Klein* case and this case, *viz.:* In the present case the policy did not insure against latent defects, whereas there was an insurance against latent defects in the *Klein* case. That policy contained the following clause:

> "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery * * * through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship," etc.
>
> *Klein* v. *Globe & Rutgers Fire Ins. Co.*, 2 Fed. (2) 137, at p. 139.

And in the course of the District Judge's opinion, it is said, at page 140:

> "But, on the other hand, the policy will cover, not only those losses that result from injuries caused by extraordinary action of the perils insured against which become immediately known, but such also as result from latent injuries."

We shall allude later in this brief to the fact that a latent defect in the towing bitts may have been the cause of the loss of the *Wash Gray;* if so, there is no liability under the policies. But in the *Klein* case there would have been liability because there the policies covered loss from latent defect.

The two cases are markedly dissimilar, and we respectfully submit that an *obiter dictum* from the opinion of the District Court Judge is all that the petitioner can show to sustain any alleged conflict of rulings between the Fifth and Third Circuits. Obviously, the District Judge in the *Klein* case used the language quoted in petitioner's brief with the facts of that case before him, and it should not be supposed that he intended such language to apply in a case where the facts are not the same.

The Petitioner's Argument Confuses a Waiver of the Warranty of Seaworthiness With What an Insured Must Show to Establish a Loss by Peril of the Sea.

The policy of insurance on which the suit is brought, insured the petitioner against

> "perils of the harbors, bays, sounds, seas, rivers

> and other waters as above named, and fires that shall come to the hurt, detriment or damage of said vessel or any part thereof. Excepting always all claims arising from or caused by the following, or other legally excluded causes, *viz.*: From all damage that may be done by the vessel hereby insured to any other vessel or property. From incompetency of the Master or insufficiency of the crew, or from the want of ordinary care and skill in loading and stowing the cargo of said vessel. From rottenness, inherent defects, and other unseaworthiness. From war, invasion, riots or civil commotion, theft, barratry or robbery. From the bursting or explosion of boilers, collapsing of flues, or any injury, derangement or breakage of machinery, unless caused by stress of weather, stranding, collision, or burning," etc. (R. 17, 18).

It should be noted that the policy contains no coverage against latent defects, as is often found in marine policies in a clause commonly known as the "Inchmaree Clause".

The Circuit Court of Appeals found as a fact that the policies insured the petitioner's steam tug *Wash Gray* against loss by perils of the sea. These policies expressly excepted claims arising from unseaworthiness (R. 646). The Court then proceeded to point out that the suit was defended on the grounds, among others, that the loss, ~~which was admitted~~, was not caused by a peril of the sea, but either by unseaworthiness or by negligent towing (R. 646). The Court found that it was immaterial whether the loss of the tug was attributable to negligent towing or to a choppy sea, because in any event the loss was not caused by a peril of the sea, which was the risk insured against by the policy.

Noting the fallacy in the protracted arguments advanced by the petitioner before it, the Circuit Court of Appeals pointed out that a warranty of seaworthiness might be waived so that the underwriters could not declare the policy void because of unseaworthiness, but at the same time, the waiving of the warranty of seaworthiness did not make the underwriters liable for unseaworthiness, nor did it relieve the petitioner of its obligation to show that the loss had occurred as the result of an insured peril. The Circuit Court of Appeals said:

> "Assuming the correctness of the trial court's finding of facts in favor of appellee, the *Wash Gray* was lost because it was not staunch enough to withstand the ordinary action of the wind and waves; in short, because it was unseaworthy. As the policy of insurance expressly excepted the risk of unseaworthiness, there can be no recovery on that ground. Appellant made its own examination and survey, and thereby waived the implied warranty of seaworthiness. It could not thereafter contend that the policy was rendered void by reason of a breach of the warranty; but it still was entitled to defend a suit as to the cause of loss, and the burden still remained on appellee to prove that the loss was caused by a peril of the sea. *New Orleans, etc., Ry. Co.* v. *Union Marine Insurance Co.*, 286 F. 32" (R. 649).

The entire argument of the petitioner in this Court is based on failure to note this distinction. Here, as the Circuit Court of Appeals clearly stated, there was no defense that the policy was void on the ground of a breach of warranty of seaworthiness, but that the defense was that there had been no loss under the policy, no

peril being shown. In other words, it was, as the Circuit Court of Appeals said,

> "immaterial whether the loss of the appellee's tug was attributable to negligent towing or to the choppy sea" (R. 648),

for no peril had been shown, the weather being such as was ordinarily to be anticipated on the voyage.

The fact found by the Court that no peril had been shown, clearly appears from the testimony of Captain Haslund (R. 413), who testified that he had been towing between Tampico and Freeport for a period of about seven years and that the weather encountered was not unusual.

The Weather Conditions Described by the Men on the Freeport Sulphur No. 1, and as Found by the Circuit Court of Appeals Being Normal, They Did Not Constitute a Peril of the Sea.

The undisputed evidence in the case is that the wind and waves encountered were not unusual and were such as are to be expected on a voyage across the Gulf. Both courts below have found the wind did not exceed 25 miles an hour and the waves did not run higher than from 4 to 5 feet from crest to trough. That no one should expect the Gulf of Mexico to remain as calm as a mill pond is a truism, and, we submit, the Circuit Court of Appeals was clearly right in its finding that the condition of the wind and weather was such as would ordinarily be expected on any voyage from Tampico to Freeport, Texas. If the light wind and small swells which the petitioner sought to magnify to

a peril of the sea could have been exaggerated into a peril of the sea, the men who wrote up the protest and the logs certainly would have done so; for as Mr. Justice Washington said in the *Virid* (Fed. Case No. 16978), more than a hundred years ago:

> "In protests the seas are always mountains high and the wind never less than a hurricane."

It has been held by this Court that the phrase "perils of the sea" as contained in a policy of insurance, has the same meaning as that phrase used in a bill of lading.

The G. R. Booth, 171 U. S. 450.

In *The Rosalia*, 264 Fed. 285, at page 288, the Circuit Court of Appeals for the Second Circuit, in defining the meaning of that phrase in a bill of lading, said:

> "The decisions of this court already contain two accepted definitions of the phrase 'Perils of the Sea', *The Warren Adams*, 74 Fed. 415; *The Guilia*, 218 Fed. 746, 134 C. C. A. 422. They need not be repeated further than to insist that the peril which forms a good exception in a bill of lading means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety."

In *The Gulnare*, 42 Fed. 861, the Court said (p. 862):

> "The protest states that she 'encountered heavy seas and rolled heavily'. This is not a peril which is insured against, but is only an ordinary peril which any strong vessel encounters everywhere."

In *Morse* v. *St. Paul Fire & Marine Ins. Co.*, 124 Fed. 451-53, the Court said:

> "The weather was stormy, but the evidence is clear that it was not of an extraordinary character for the season; that is, November, 1901, in which month the voyage was commenced."

In *Higgie* v. *American Lloyds*, 14 Fed. 143, the master testified (at p. 146):

> "After we left Las Palmas she encountered heavy weather. There is a tradewind down there which makes a very heavy sea; they shook her up pretty lively; she rolled very heavy; first one way under and then the other way under.
>
> We had to reef sails and shorten things down. Between midnight and morning found she was making more water than usual; at daylight was making water very badly—so much so it was thought best to make a port of safety and find out whether we could do anything to stop the leaks."

The Court, in discussing this testimony, said (at p. 147):

> "There was no extraordinary peril encountered; the vessel rolled heavily upon the waves produced by the tradewinds. There was no gale, no storm such as would have imperiled a staunch, strong vessel."

In the *Rappahannock*, 184 Fed. 291, the Court held that a gale in which the wind reached a velocity of sixty miles an hour was not a peril of the sea. The Court said:

> "The evidence showed that the *Rappahannock* on this trip encountered three severe gales, on

> Lakes Superior, Huron and Erie, respectively. The captain and mate estimated the wind velocity at sixty miles an hour. They encountered heavy seas, sometimes quartering; but in the fall of the year such gales and seas are not infrequently encountered on the Lakes as the captain himself admitted. None of the witnesses claim or pretend that the gales were extraordinarily terrific or that there were exceedingly heavy pitching and plunging of the vessel on the swells of the sea * * *.
>
> The conclusion is that the *Rappahannock* encountered conditions of wind and sea which were not unusual at that season of the year."

The standard definition of the term "perils of the sea" which was formulated by Mr. Justice Story nearly one hundred years ago in *The Reeside,* Fed. Case No. 11657, and which has since been constantly adhered to, is as follows:

> "The phrase 'danger of the seas', whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In *British & Foreign Insurance Co.* v. *Gaunt,* 1921, 2 A. C. 41, 57, Lord Sumner says:

> "It (insurance) covers a risk, not a certainty."

Or, as Arnould expresses it (Vol. II, p. 1001, 11th Ed.):

> "The damage caused by springing a leak is not a charge upon the underwriters, unless it is directly traceable to some fortuitous occurrence, as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being driven on a rock, etc.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable." (Arnould on Marine Insurance (11th Ed.) §777.)

Or as Lord Herschell put it in *The Xantho*, 12 App. Cas. 503, at page 509:

> "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

An Admission of Seaworthiness Does Not Render an Underwriter Liable in the Absence of Proof of a Sea Peril.

The Privy Council considered the whole matter in the case of *Grant, Smith & Co.* v. *Seattle Construction* Co., 1920 App. Cas. 162, at page 171. The head-note of the case is as follows:

> "The appellants hired from the respondents

for two years a dry-dock to be used afloat in construction work on caissons at Victoria, British Columbia. By the hiring agreement the appellants admitted that the dry-dock was seaworthy and fit for the work contemplated, and agreed to keep it insured for the benefit of the respondents for $75,000 against marine risks and to redeliver it in equally good condition save for wear and tear. While the dry-dock was being used in harbour for the contemplated work it capsized and was totally lost; the accident was due to its inherent unfitness for the work, and not to any condition of the wind or sea. The appellants had failed to insure the dry-dock as agreed; its value was only $34,500.

HELD, that the loss was not due to a marine risk, and that consequently the respondents were not entitled to recover as damages $75,000 but only $34,500.

Judgment of the Court of Appeal affirmed."

During the course of the judgment, Lord Buckmaster said:

"In the case of *E. D. Sassoon & Co.* v. *Western Assurance Co.*, a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not, and it could not, be detected. It was held by this Board that the loss was not within the phrase 'perils of the sea and all other perils', and Lord Mersey, in delivering the opinion of the Board, states:

'There was no weather, nor any other fortuitous circumstance, contributing to the incur-

> sion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea.'
>
> Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible. An insurance against 'the perils of the sea or other perils' is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water."

In the case of *E. D. Sassoon & Co.* v. *Western Assurance Co.*, cited by Lord Buckmaster, there was no warranty of seaworthiness. (*Sassoon & Co.* v. *Western Assurance Co.*, 1912 App. Cas. 561, at p. 562.)

See also:

> *New Orleans, Texas & Mexico Railway Co.* v. *Union Marine Insurance Co.*, 286 Fed. 32, 35.

Petitioner virtually says there was a peril of the sea because the boat was lost and because the underwriters admitted she was seaworthy when she sailed. If we should admit this bold proposition, yet petitioner would

fail here, because, as what petitioner is in effect attempting to do is to prove a loss by sea peril by eliminating the possibility of all other causes of loss, and as it has failed to show that the bitts did not give way from latent defect, it has failed to eliminate that cause.

Thus here, the weather conditions being shown to have been ordinary, the loss of the vessel being due to the fact that the bitts pulled out, if any presumption is to be indulged in, such presumption would be that there was some insufficiency in the bitts not discoverable by inspection. See *Pederson* v. *John D. Spreckles & Bros. Co.*, 87 Fed. 938, page 945, where it is said:

> "The presumption, therefore, if any is to be indulged in, would be that the breast chock was defective because it broke."

The Circuit Court of Appeals Having Decided That the Petitioner Had Failed to Make Out Its Case Found It Unnecessary to Discuss the Three Affirmative Defenses Set Up by the Underwriters in Their Answer. These Defenses Were:

(1) *The petitioner failed to disclose to the underwriters that the towing company was not to be liable for loss or damage to the "Wash Gray", a fact material to the risk and thereby rendered the policy void. Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 107 U. S. 485.

(2) *The petitioner violated a provision of the contract of insurance when it stipulated in the towing contract that the towing company should not be liable for loss or damage to the "Wash Gray", the vessel insured.*

(3) *The petitioner failed to disclose to the underwriters the fact that the "Wash Gray" was to be towed at the rate of nine miles an hour, a fact material to the risk.*

From pages 33 to 48 of its brief, the petitioner discusses the affirmative defenses set up by the respondent in its answer. In an effort to brush these defenses aside, the petitioner alludes to them as "technical defenses". It is sufficient to say, however, that a large part of the numerous briefs filed by the petitioner in the Circuit Court of Appeals is devoted to the discussion of the merits of these so-called "technical defenses". The first defense set up the failure of the assured to disclose to the insurance company a fact which was material to the risk, *viz.*: that before the issuance of the policy the petitioner had entered into a contract in writing with the owners of the *Freeport Sulphur No. 1*, the towing vessel, whereby it was agreed that the *Wash Gray* should be towed by the *Freeport Sulphur No. 1*, but that

> "Steamship *Freeport Sulphur No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (R. 31).

It was conceded that this fact was not disclosed. All of the underwriters testified that it was material to the risk, as obviously it was. Hence, under the decision of this Court in *Sun Mutual Insurance Co.* v. *Ocean Insurance Company*, 107 U. S. 485, the policy was void. In the *Sun Mutual* case, this Court said (p. 510):

> "In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obliga-

> tion in both cases is one *uberrimae fidei.* The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive."

The second defense set up the following clause of the policy:

> "Any agreement, contract or act, past or future, positive or implied by the insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the company's right to retain or recover the full premium shall not be affected" (R. 32, 33).

The answer alleged that the towing contract constituted a breach of this provision of the policy and alleged that by reason of the said contract, the underwriter had been deprived of subrogation, in the event of payment of the loss, because of the provisions of the towing contract and that the policy had thereby been rendered void. Much evidence was taken on this subject which it is unnecessary to review now. It will suffice to say that if the case is to be reviewed, such evidence will be considered fully.

The third affirmative defense set up the fact that the petitioner knew that the *Wash Gray* would be towed at a speed from 9 to 10 knots per hour at the time the insurance was issued, but failed to disclose this fact to the underwriters.

The petitioner states that these affirmative defenses were ignored by the Court of Appeals. The fact is, however, that the Court of Appeals did not find it necessary to discuss these affirmative defenses as it was satisfied that the petitioner had failed to make out its case. The Court said:

> "It is immaterial whether the loss of appellee's tug was attributable to negligent towing or to the choppy sea" (R. 648).

The Petitioner Sought to Excuse Its Failure to Disclose the Fact That the Towing Was to Be Done at the Risk of the Petitioner by Proof of an Alleged Usage or Custom.

(1) *The petitioner ignored a provision in the policies that no custom or usage should affect, control or void any condition of the policy unless endorsed thereon in writing.*

(2) *The petitioner failed to establish that the alleged usage or custom was so general as to be universally known to all engaged in the trade. Tate* v. *Hyslop,* 15 Q. B. D. 368.

In an effort to meet the affirmative defense set up by the underwriters with respect to the failure to disclose, the petitioner endeavored to establish a custom or usage in the Gulf for towing to be done under contracts such as the petitioner entered into with the owners of the *Freeport Sulphur No. 1.* We submit that the petitioner not only failed to establish such a custom, but

that the policy itself precluded the parties from relying upon a custom. The policy provides:

> "no custom, usage or waiver of any kind shall affect, control or void any condition of this Policy, unless endorsed hereon in writing" (R. 22).

It was never contended in either of the lower courts that the waiver suggested was ever endorsed on the policy or reduced to writing, nor was it contended that the underwriters orally waived the production of the towing contract. The proof is conclusive that the underwriters knew nothing of the existence of the towage contract. Although the name of the towing steamer was inserted in the policy by the assured, not by the underwriters, nothing was disclosed to the underwriters regarding the conditions upon which the towage contract was to be performed. Mr. Young, the broker representing the petitioner who placed the insurance, testified that he made no disclosure to the underwriters in regard to the terms of the towage contract at any time (R. 462). The various representatives of the insurance company testified that if they had known that the contract contained a clause exempting the towing company from negligence, they would not have issued the policy (R. 483, 529, 530). The first that the underwriters knew of the existence of the contract was on June 20, 1922, after the loss, when a copy of it was sent them by William H. Young & Company, brokers for the petitioner (R. 273, 274).

The law is well settled that to dispense with the necessity for the communication of a material fact the

usage must be universally known to all engaged in the trade.

> "But to dispense with communication of anything done according to usage, such usage must be general and universally known to all engaged in the trade." Citing decision of Lord Eldon in *Tennant* v. *Henderson*, 1 Dow. 324, 3 English Reprint, 716.
>
> Arnould on Marine Insurance, Sec. 610.

And Arnould, in Section 609, says (p. 805):

> "The assured cannot, however, excuse his omission to communicate a material fact on the ground that the fact had previously come to the knowledge of the underwriter, unless at the time when the contract was made the fact was present to the underwriter's mind." Citing *Bates* v. *Hewitt*, L. R. 2 Q. B. 595.

Arnould also says (Sec. 609, p. 806):

> "It has also been held in the Supreme Court of the United States that the assured cannot excuse his omission to disclose material facts by showing that they were actually known to the underwriter unless the knowledge of the latter was as full and particular as his own." Citing *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485.

In *Tate & Sons* v. *Hyslop*, 15 Q. B. D. 368, the Court of Appeal in England considered a case almost identical with that now before us. Usage or custom was there relied on, but the Court held that such a usage or custom as was proved did not excuse the assured from disclosing

the terms of an agreement because it was not so general that every merchant contracted with respect to it. Here the petitioner's own witness, Walsh, testified that it was his understanding that towing on the Gulf was to be done under a contract whereby the towing company was to be responsible for the towing company's own fault (R. 393). There is a mass of other evidence which must be discussed if the case is to be reviewed, and we have merely alluded to the issues involved in the case so that the Court may have before it upon consideration of this application an outline of the entire case. A review of the case here will involve a reconsideration not only of the question on which the Circuit Court of Appeals decided the case in favor of the respondent, but also of the affirmative defenses, which, in view of its decision that Court found it unnecessary to discuss.

The prayer of the petitioner should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520.
OCTOBER TERM, 1927.

The Compania de Navegacion, Interior, S. A., Petitioner,
510 *vs.*
Fireman's Fund Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
511 *vs.*
Globe & Rutgers Fire Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
512 *vs.*
Northwestern Fire & Marine Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
513 *vs.*
Hartford Fire Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
514 *vs.*
National Liberty Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
515 *vs.*
Aetna Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
516 *vs.*
Western Assurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
517 *vs.*
Liverpool & London & Globe Insurance Company, Ltd.

The Compania de Navegacion, Interior, S. A., Petitioner,
518 *vs.*
Springfield Fire & Marine Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
519 *vs.*
Franklin Fire Insurance Company.

The Compania de Navegacion, Interior, S. A., Petitioner,
520 *vs.*
Phoenix Insurance Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 14, 1928.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

These are eleven libels filed in the District Court of the United States for the Eastern District of Louisiana by a Mexican corporation known as the Compania de Navegacion, against as many dif-

ferent insurance companies, English and American, on eleven separate policies, insuring the tug "Wash Gray" in favor of the libelant as owner in different sums aggregating $85,000, and covering a voyage of the tug while in tow from Tampico, Mexico, to Galveston, Texas.

The tug was designed for inland waters. It was 87½ feet long, with 19 feet beam, 9 feet depth of hold, and was of 105 tons. She was insured specially for this sea voyage, to be towed as agreed with the Insuring Companies by the "Freeport Sulphur No. 1," a vessel engaged in regular trade on the Gulf of Mexico, and measuring 309 feet in length, 45 feet beam, with 22½ feet depth, and of approximately 3,000 tons displacement.

When application was made for insurance, the underwriters required an inspection for seaworthiness, general fitness and towing arrangements for that voyage. For that purpose two well known marine surveyors, representing the various underwriters, made a thorough, critical inspection, followed by recommendations for preparations for the voyage, including certain overhauling, particularly of her towing bitts and decking, and for the planking up of doors, ports, and other openings. They reported in writing to the underwriters that the requirements had been complied with, and certified her seaworthiness, and her fitness for the particular voyage. Because of the extra hazardous risk involved in the transit of this small inland vessel in tow at sea, the premiums were much increased by the underwriters. They varied, in the different policies, between one and one-half to two and one-eighth per cent, or from six to more than eight times the usual rate for a tow of the ordinary size and power to resist the sea. The voyage contemplated was first to Freeport, Texas, a distance of some four hundred and twenty miles, a trip taking some forty-five or fifty hours. From there, she was to go to Galveston by another towing vessel, also to be satisfactory to the underwriters. The weather from Tampico was fair and the sea calm. She followed nicely, handled well, and continued in tow through the first night and through the next day, making some nine miles per hour with no straining or difficulty. Ordinarily, under her own power, she was good for from ten to twelve miles per hour. During the second evening, came a fresh to strong northwesterly breeze. Later the weather grew squally, until about 8 o'clock the wind reached a

velocity of twenty-five miles an hour, with occasional puffs or gusts. Because of these and a cross current and swell, the sea grew choppy, with waves running up four to five feet from trough to crest, and sufficient to break over her head. The rough weather and the choppy seas put a strain on the vessel. As required by contract, she had up all steam necessary to work her pumps. The mate was sent below and in a few minutes reported to the captain that the forward bitts had worked loose, that her seams were opening, and she was taking water rapidly. The pounding and straining continued until she made more water than her pumps could discharge. She was then about 100 miles from Freeport, Texas, and had completed three fourths of the voyage to that point. The "Wash Gray's" captain signalled to the towing ship to stop. The water in the tug had rolled forward, thus bringing her head down. The tow lines were then cut. This brought her head up and she righted herself. The larger vessel stood by. The captain of the "Wash Gray" notified the towing captain that the tug could stand no more pulling. Shortly thereafter the captain and crew of the tug were taken aboard the ship for safety. The latter then stood by until daylight when the master sent his engineer, mate and some six men on board the tug to attempt to save her. They found no water in the boiler for steam. They attempted by a hose to pump it in, but the leaking sea water put out the fire. The vessels then proceeded slowly at one mile per hour until half past ten when the tug began to sink slowly and went down at half past eleven.

The District Judge found for the owner of the "Wash Gray" on all the policies. The Insurance Companies appealed to the Fifth Circuit Court of Appeals, which without objecting to the facts as found by the District Court reversed the case with directions to dismiss the libels.

Counsel for the Insurance Companies seek to sustain the judgment of the Circuit Court of Appeals on four grounds. They say, first, that the Insurance Companies were released from liability because there was not disclosed to them before the voyage a contract of towage, a term of which was material to the risk and was concealed and the policies were thus avoided. The towage contract was as follows:

"Freeport Sulphur No. 1 will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep

sufficient men on board to keep up steam and man the tug's pumps. S. S. Freeport No. 1 is not responsible in any way for loss or damage to the Wash Gray."

All the policies had attached to them by rider and rubber stamp a clause like the following:

"Any agreement, contract or act, past or future, positive or implied, by the Insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost, which would, on acceptance of abandonment, or payment of loss by this company, belong to this Company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the Company's right to retain or recover the full premium shall not be affected."

We do not think that the towing contract has the effect claimed for it by the companies. It did not release the "Freeport" from any loss or damage to the "Wash Gray" due to the negligence of the master or crew of the towing vessel; and for a loss thus caused the companies would be subrogated to the claim of the owner of the "Wash Gray".

The rule laid down by this Court in *The Steamer Syracuse*, 12 Wall. 167, 171, covers the point. That was a libel by the owner of a canal boat against the Steamer Syracuse for negligence in towing the canal boat and running her into a vessel at anchor in the harbor of New York. The claim was made that there had been a special agreement between the canal boat and the steamboat by which the canal boat was being towed at her own risk. Upon this point the Court said:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy.

The second objection is that the tug was negligently towed at too great a speed, proximately causing the loss. There is really very little evidence to sustain the claim that there was any negligence on the part of the towing vessel or her master or her crew. The trial court specifically found that the towing was well done, that nine miles an hour was not too fast a speed to be maintained, but that on the contrary the maintenance of such speed was necessary in order to prevent the towed vessel from turning over or careening, and there is no finding to the contrary by the Court of Appeals.

The third objection is that the tug was not seaworthy and therefore the risk never attached. The finding by the trial court distinctly negatives any such claim. It said:

"Libellant's case, upon this point, does not depend entirely on the fact that, as a condition precedent to the underwriting, the insurers required and obtained inspections, detailed recommendations of two expert marine surveyors, and a certificate of compliance with all requirements deemed by them necessary to show that the Wash Gray was seaworthy and fit, equipped and apparelled with a view to the particular voyage, in tow of the particular ship Freeport, to be thence towed by another approved by them to Galveston, for the specific known purpose of general overhauling and changing her engines. There is, additionally, the oral testimony which clearly shows that these surveyors were correct in their report and had competently functioned in making their recommendations and accepting the compliance by the owner, as per their certificate. The unwarranted assumption that the Wash Gray pulled apart, upon the contrary is argued in the brief of respondents is not sustained by the evidence. She did not pull apart in any particular. It is conclusively shown, and uncontradicted, that her forward bitts pulled loose because of the extraordinary straining and pounding under the stress of weather encountered. This was overcome, as the evidence shows, by the rigging of the Spanish windlass. The water which caused the sinking was shipped through her seams, from which the caulking had worked by the same cause. The only hope of overcoming this was by pumping, but pumping was inadequate."

This issue however, brings up clearly the difference between the view of the District Court and that of the Court of Appeals in respect to liability in this case. What does "seaworthy" mean in the implied or expressed warranty to which the insurer is to be held?

Arnould on Marine Insurance, Vol. II, tenth English edition says:

"Sec. 710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary, with the varying exigencies of mercantile enterprise. 'The ship', said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter' on the voyage. Steel *v.* State Line S. S. Co. (1877) 3 App. Cases, 72, 77. . . .

"Again the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means." *Burges* v. *Wickham* (1863) 3 B. & S. 669; *The Vortigern* (1899) P. 159; *Clapham* v. *Langton*, 34 Law Journal, Q. B. 46; *Turnbull* v. *Jenson*, 3 Aspinwall W. S. 433.

This view of varying seaworthiness according to the circumstances known to both parties is fully supported in the case of *Thebaud* v. *Great Western Insurance Company*, 155 N. Y. 516. There the plaintiff applied to the defendant insurance company to insure, for a voyage from Philadelphia to Frontera, Mexico, a steamer in course of construction for use on rivers and inland waters. The defendant caused the vessel to be examined by an engineer, and issued the usual marine policy, exacting, however, a double premium. The vessel proceeded part of the way on her voyage, avoiding the sea, but in reaching Mexico she had to put out to open sea and was lost. It was held that as both parties to the contract knew that the vessel was not a sea-going craft or suitable for the navigation of the high seas, and as the defendant issued its policy with full knowledge of the nature of the risk, the warranty of seaworthiness, implied in a contract of marine insurance should not be construed in a way to be repugnant to the general purpose of the parties in executing the contract, nor held to be broken by the fact that the vessel was not so constructed as to be fit for a sea voyage. See 4 Joyce on Insurance section 2159.

In *Klein* v. *Globe & Rutgers Insurance Company*, 2 Fed. (2d) 137, decided by the Circuit Court of Appeals of the Third Circuit, the policy covered an upper river steamboat for a voyage down the Mississippi River to New Orleans, and from there in tow down the river and across the Gulf to Tampico, for which a higher premium than usual was paid. She was bulkheaded and otherwise prepared under the supervision of the agents of the insurance company for her voyage to Tampico. She was inspected and found to be thoroughly all right at the mouth of the Mississippi River, but after she was being towed in the Gulf, an examination disclosed considerable water in the hold and thereafter the vessel sank. It was held that the implied warranty of the insured was that the boat was seaworthy to the extent of being able to withstand all the ordinary perils of navigation of the upper river and that the perils of the sea in the Gulf, against which she was insured, were such perils as would be extraordinary to a vessel of her type. Judgment was given for the insured.

Again, in the *Farmers' Feed Company* v. *Insurance Company of North America*, 166 Fed. 111, affirming the district court for the Southern District of New York, 162 Fed. 379, the defendant insurance company knowing the age and exact condition of a barge, insured her for operation in waters adjacent to New York at a high premium. The loss occurred by reason of wind and tide near Brooklyn Bridge and the defense was of unseaworthiness. The Second Circuit Court of Appeals said:

"The Mackey was undoubtedly very old and somewhat decayed, but her condition, her history and all the facts regarding her were fully known to the company at the time the policy was executed, a written record stating all the particulars being on file with the company. The underwriters knew that she was not a desirable risk, they knew they were taking more than an ordinary hazard and they guarded themselves against it by charging more than the ordinary premium. The theater of the Mackey's operations were, by the express terms of the policy, confined to the waters adjacent to New York, practically New York harbor. The ordinary perils of the sea were not intended, but only such perils as were to be encountered in the comparatively quiet waters referred to. The question of seaworthiness must be considered in the light of the service required. . . .

The fourth objection claimed by the respondents is that no recovery could be had because the loss of the "Wash Gray" was not

caused by any peril insured against. These policies all contained a clause like the following:

"It is the intent of this insurance company by this policy to fully indemnify the insured against the adventures and perils of the harbors, bays, sounds, seas, rivers and other waters above named".

It is urged by the Insurance Companies that weather when the wind did not exceed a velocity of twenty-five miles, though with squalls, and with a cross current and swell producing a choppy sea with waves five feet high and breaking over the head of the vessel did not constitute a peril of the sea.

There was some emphasis too placed by counsel for the companies on the log of the "Sulphur No. 1" in which the state of the weather and of the sea seemed to be minimized. Upon this point the trial court finds it to be unreliable because the entries in the log do not seem to have been made at the times of the observations they record and moreover the entries were made from the standpoint of a vessel of 3,000 tons, and not one of a vessel of the size of the "Wash Gray." The court said:

"What amounts to a light breeze, or a small swell, or a choppy sea, as logged for a large ocean-going steel vessel, would be relatively, if logged for a little inland wooden tug, with two or three feet of freeboard, an extremely dangerous gale and rough sea. The first would ride comfortably, safely and easily, while the other would toss and pound furiously, strain her timbers, lose the caulking of her butts and seams, and so contrast the comparative calm for one to the comparative fury for the other. The oral testimony, however, makes such speculation and refinement unnecessary, since it convincingly shows that for the 'Wash Gray' in the open Gulf, the wind and the condition of the sea were extremely perilous; that both the towing ship, its officers and crew and the crew of the little tug omitted nothing that good seamanship, skill and prudence would indicate."

But it is contended on behalf of the insurance companies that the phrase "perils of the sea" has not a varying but an absolute meaning, and they rely on the language of Mr. Justice Story in the *Reeside,* 20 Federal Cases, No. 11, 657, p. 458 (2 Sumn. 567), quoted and approved in *Garrison* v. *Memphis Insurance Company,* 19 How. 312. In the former case the question was whether bales of carpeting greatly damaged by absorbing oil which had leaked from a number of casks, said to have been improperly stowed, was

occasioned by the perils of the sea and the extraordinary rolling of the schooner during the voyage. Justice Story said:

"The phrase 'danger of the seas' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include such losses as are of extraordinary nature, or arise, from some irresistible force, or some overwhelming power, which can not be guarded against by the ordinary exertions of human skill and prudence".

But we think the definition of "dangers of the sea" by Justice Story was meant by him to be applied in the ordinary case of a sea-going vessel with no special circumstances as to the exceptional character of the vessel known to both parties and recognized by both in a high premium charged and paid. A contract of maritime insurance is usually not different from any other contract except that the words and phrases used may have a technical nautical meaning to be understood by the parties and enforced accordingly. We have seen however from the cases that the phrase "seaworthiness" varies with the circumstances and the exceptional features of the risk known to both parties. The view of the Circuit Court of Appeals that perils of the sea has an absolute meaning and may not be varied by the knowledge of the parties as to the circumstances and must be maintained stiffly in favor of the insurance companies and against the insured, is not necessary or reasonable. The variation in the significance of "seaworthy" as shown by the above authorities when caused by exceptional circumstances known to both parties, applies as well to the meaning of perils of the sea as to that of seaworthiness. The two terms in such cases are correlative terms. *Klein* v. *Globe & Rutgers Insurance Co.*, 2 Fed. (2d) 137, 139, 140.

The Circuit Court of Appeals distinguished *Klein* v. *Globe & Rutgers Insurance Company*, *The Farmers' Feed Company* v. *The Insurance Company* and *Thebaud* v. *Great Western Insurance Company*, and 4 Joyce on Insurance, Section 2159, as follows:

"Recovery was allowed in each of those cases on the actual contract which was held to be different from the contract evidenced by the insurance policy. It was merely held that effect should be given to the actual contract. The facts in this case do not warrant

the conclusion that appellant bound itself by its conduct or by any agreement to accept the risk of unseaworthiness."

We find ourselves unable to follow this distinction. In all these cases the recovery was on the contract, and the question was of the construction of the contract. Its construction was affected necessarily by the special circumstances surrounding the contract known to both parties and acted on by them in charging and paying an increased compensation for the risk run. The circumstances in this case are very like those shown in the cases cited. They certainly justify the conclusion to which we have come.

The judgment of the Circuit Court of Appeals is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.